EME COURT, U.S. 74-772

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

PEOPLE OF THE STATE OF CALIFORNIA; THE JUSTICE COURT OF YUBA CITY, SUTTER COUNTY, CALIFORNIA; JUDGE CLAUDE J. MILLER, YUBA CITY JUSTICE COURT; THE JUSTICE COURT OF GROVER CITY, SAN LUIS OBISPO COUNTY, CALIFORNIA; JUDGE G. S. DANA, Grover City Justice Court; and all Justice Courts similarly situated within the State of California; THE JUDICIAL COUNCIL OF THE STATE OF CALIFORNIA; RALPH KLEPS, Administrative Director of the Judicial Council, State of California; STATE OF CALIFORNIA,

Petitioners,

v.

LEWIS GORDON, SANTIAGO ARGUIJO, individually and on behalf of all other persons similarly situated,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

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Petitioners,

v.

LEWIS GORDON, SANTIAGO ARGUIJO, individually and on behalf of all other persons similarly situated,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

The People of the State of California respectfully petition that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in this case on September 26, 1974.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California, filed on August 14, 1974, is printed as Appendix A hereto and is reported at 12 Cal.3d 323 ____ Cal.Rptr. ____ ____ P.2d ____ (August 14, 1974); the modification of said opinion is printed as Appendix B hereto and is reported at 12 Cal.3d 607A ____ Cal.Rptr. ____ ____ P.2d ____ (September 26, 1974).

The opinion of the California Court of Appeal, Third Appellate District, filed on July 3, 1973, and modified on July 13, 1973, is printed as Appendix C hereto.

The opinion of the Sacramento Superior Court is printed as Appendix D hereto.

JURISDICTION

The Supreme Court of the State of California entered judgment in this case on August 14, 1974. The timely petition for rehearing and/or modification of opinion was filed, and, on September 26, 1974, the Supreme Court of the State of California entered its order modifying the opinion and denying the petition for rehearing. (The order denying the petition for rehearing is printed as Appendix E hereto.)

The jurisdiction of this Court is invoked under Title 28 U.S.C. section 2101(c) and Rule 22(3), Supreme Court Rules.

QUESTION PRESENTED

Does the due process clause of the Fourteenth Amendment to the United States Constitution man-

date attorney status for all judges or magistrates in every criminal case in state courts of lowest jurisdiction where there is a possibility of a jail sentence being imposed on the defendant?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the Constitution of the United States and the provisions of the Constitution of the State of California and the provisions of California Penal Code section 1425 and California Government Code sections 71145 and 71601 are set forth in Appendix F hereto.

STATEMENT OF THE CASE

A. Lower State Court Proceedings

On March 25, 1971, there was filed in the Superior Court for the County of Sacramento, State of California, by respondents herein a "Petition for Alternative Writ of Prohibition and Mandate, for Peremptory Writ of Prohibition and Writ of Mandate and for Declaratory Relief" by which they attacked the constitutionality of the existing composition of the California justice courts on the ground that the judges of said courts are not required to be lawyers and so lack the legal qualifications necessary to provide a fair and impartial trial. Further, it was alleged that the California system of non-attorney justice court judges violates equal protection guarantees because whether a

particular defendant is tried before an attorney judge or a non-attorney judge might well depend upon only the happenstance of geography.[1] Following the filing of an answer, (CT 183)[2] an amended complaint/petition was filed (CT 228). A demurrer and answer to the amended petition was filed (CT 232) and following issuance of the alternative writ of mandate (CT 262) the trial court sustained the demurrer without leave to amend in a written decision filed on August 5, 1971 (CT 269 et seq.). (Appendix D.) The trial court treated the matter as a class action proceeding; the federal constitutional issues of due process and equal protection were raised and considered by the court in its opinion. (Appendix D p. 74.)

B. State Appellate Proceedings

A petition for an original writ of prohibition and mandamus was filed in the California Court of Appeal, Third Appellate District, on August 27, 1971. That petition was denied by the Court of Appeal on the ground that the proper method of review was by appeal. (The California Supreme Court declined to review this order of the Court of Appeal.)

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[1] The California Supreme Court rested its decision solely upon the federal constitutional ground of due process and did not consider the equal protection argument.

[2] CT refers to the Clerk's transcript on appeal. This record was before the Court of Appeal and Supreme Court of California and a certified copy has been filed with this Court.

A notice of appeal in the California Court of Appeal, Third Appellate District was duly filed on October 4, 1971 (CT 286).[3]

The Court of Appeal affirmed the judgment of the Superior Court and held that neither the due process nor the equal protection provisions of the Fourteenth Amendment of the United States Constitution imposed "a requirement upon a state to insist upon a law degree (or admission to the Bar) as a prerequisite to judicial qualification at the justice court level." (Appendix C p. 68.)

[3] Since the filing of this appeal both Gordon and Arguijo pleaded guilty to lesser charges before attorney judges. Petitioners filed a motion to dismiss the appeal in the Court of Appeal and this motion was denied by that Court. (Appendix C p. 40). The issue was again raised by petitioners in the California Supreme Court, that Court also refusing to dismiss the case for the reason: "These events, however, have not rendered the case moot, for according to well established principles, 'if a pending case poses an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot.'" (Appendix A p. 20.)

The record in this case makes it clear that non-attorney justice court judges continue to sit in misdemeanor cases in California since the *Gordon* decision, by its terms, is not applicable to cases commencing before February 1, 1975. The impact of the decision on the California justice courts thereafter will require severe changes, however. (Appendix G hereto.) Therefore, although there is no criminal action pending against the named respondents in this Court the case is not moot because the dispute which gave rise to this litigation remains unresolved; there thus exists not merely the speculative possibility of non-attorney judges presiding over proceedings in criminal cases or the mere theoretical possibility of a severe impact of the decision upon petitioners, but the presence of an existing unresolved dispute which continues at the present time. Thus the requirement of a case or controversy is present. (See *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 21 L.Ed. 2d 325, 89 S. Ct. 347 (1968); *Roe* v. *Wade*, 410 U.S. 113 (1973).

Respondents filed a petition for hearing in the California Supreme Court, and on September 6, 1973, the court granted a hearing. Following briefing and argument, the court on August 14, 1974, (modified on September 26, 1974) issued its opinion holding that the current practice in California of allowing non-attorney judges to preside over criminal trials or proceedings involving charges which carry the possibility of a jail sentence violates the constitutional rights of the defendants under the due process clause of the Fourteenth Amendment of the United States Constitution and ordered an end to such practice as to those criminal trials which commence on or after February 1, 1975. In reaching that decision, the Supreme Court reasoned that "there has been a vast increase in the number of attorneys in all areas of the state and substantial improvement in roads, highways and transportation. Furthermore, the increasing complexity of criminal law and criminal procedure has greatly enhanced the probability that a layman will be unable to deal effectively with the complexities inherent in a criminal trial." (Appendix A p. 23.) The court held that because a defendant's fundamental right to a fair trial is involved the test by which the procedure is to be measured is whether there is a "reasonable likelihood" that a fair trial could not be had. In support of this test the court relied upon *Sheppard* v. *Maxwell,* 384 U.S. 333, 363 (1966) and the California cases applying the rule of *Sheppard* in cases involving the question of a change of venue.

In reaching its conclusion that the mere presence of a non-attorney judge meets the reasonable likelihood test of the denial of a fair trial, the court continued to rely upon decisions of this Court implementing defendants' fundamental rights in a variety of contexts: The right to counsel at arraignment (*Hamilton* v. *Alabama,* 368 U.S. 52 (1961)); the right to a trial before a disinterested and impartial judicial officer (*Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972)); the right to a fair trial, free of prejudicial publicity (*Sheppard* v. *Maxwell, supra,* 384 U.S. 333); *Estes* v. *Texas,* 381 U.S. 532 (1965)); the right to a trial before an impartial jury (*Turner* v. *Louisiana,* 379 U.S. 466 (1965)); the right to examine and cross-examine witnesses and the right to a fair trial in a fair tribunal, (*In re Murchison,* 349 U.S. 133 (1955)); the right to a trial before a judge having no pecuniary interest in its outcome (*Tumey* v. *Ohio,* 273 U.S. 510 (1926)).

The court, continuing with its constitutional analysis of the California justice court system found additional support for its conclusion in this Court's decision holding the right to counsel applicable in misdemeanor cases: "We are by no means convinced that legal and constitutional questions involved . . . are any less complex than when a person can be sent off for six months or more." (*Argersinger* v. *Hamlin,* 407 U.S. 25.) (Appendix A p. 24.)

Reliance upon the decisions of this Court by the California Supreme Court is perhaps most clearly indicated in the analogy drawn by it to the fundamental right to assistance of counsel established by this Court

in *Gideon* v. *Wainwright,* 372 U.S. 335 (Appendix A p. 30):

> "Since our legal system regards denial of counsel as a denial of fundamental fairness, it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process. [Footnote omitted.] . . ."
>
> * * * * *
>
> "We conclude that, under today's advanced standards, due process demands that henceforth [footnote omitted] a defendant charged with an offense carrying a possible jail sentence must be provided with an attorney judge to preside over the proceedings, unless he elects to waive such rights."

REASONS FOR GRANTING THE WRIT

At the present time 35 states (Appendix C p. 44) and federal law (28 U.S.C. § 631(b)) permit non-attorneys to be judges or magistrates. The use of non-attorney personnel in a variety of roles involving the exercise of judicial authority and power has a long history in the United States as it does in England and the practice persists to this day in a majority of the states, in England in the Federal judicial system. In those jurisdictions where there has been a restriction of this practice, the change has been accomplished through legislation, not through judicial decision. Thus California stands alone in imposing the requirement of attorney status as a matter of Federal Constitutional due process.

Because of this widespread acceptance and use of non-attorney judges throughout the United States[4] and their recognition under the Federal Rules important practical and legal reasons exist for granting this petition for writ of certiorari.

While this Court has not yet decided the question presented by this petition[5] several decisions have touched upon the issue and support the granting of this petition. In *Tumey* v. *Ohio, supra,* 273 U.S. 510 a case involving the use of the fee system for the payment of judges' salaries, this Court held that there is nothing in the Federal Constitution to prevent a state from providing such a system of courts as it chooses and that a mayor may, consistent with due process, exercise judicial functions.

In *Shadwick* v. *City of Tampa,* 407 U.S. 345 (1972) it was held that although clerks of municipal courts were not lawyers or judges, they qualified as neutral and detached magistrates; and nothing in the Fourteenth Amendment prohibited them from so acting.

In *Snyder* v. *Commonwealth of Massachusetts,* 291 U.S. 97 (1933) involving a state statute authorizing a jury to view the scene of the crime without the defendant being present, this Court recognized that states are free to regulate court procedures in accordance with their own conception of policy and fairness, under the Fourteenth Amendment, unless the

[4] See California Justice Court Judges, 3 Pac.L.J. 439.

[5] It is noted that this question may be presented in a somewhat different context in the case of *North* v. *Kentucky*, October Term 1974 No. ____ in which a jurisdictional statement has been filed with this Court.

statute offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

As indicated hereinabove in 35 states non-attorney judges are a part of the states' judicial system. Indicative of the acceptance of this practice by the states is the fact that remarkably little litigation on this issue has resulted and in every case so litigated, except the one at Bench, the practice has been upheld. And, it is respectfully submitted, the decisions of our sister states are based upon analysis and reasoning more persuasive than that expressed by the California Supreme Court in its decision herein.

In *Ditty* v. *Hampton,* 490 S.W. 2d 772 (1972) (appeal dismissed 414 U.S. 885) the Kentucky Court of Appeal considered a case involving the constitutional validity of state statutes permitting a city police court, presided over by a non-attorney judge, to try criminal proceedings wherein convictions could result in the defendant being both fined and imprisoned. The court concluded that due process requires that the tribunal be fair and impartial but that those principles assuring a defendant the right to counsel to defend him do not support the conclusion that he is entitled to a judge who is a lawyer to hear the case.

In *Crouch* v. *Justice of Peace Court,* 7 Ariz.App. 460, 440 P.2d 1000 (1968) the Arizona Court of Appeal considered this issue in a case involving the appeal of an intoxication conviction from a Justice Court following a jury trial in which the non-attorney

judge had instructed the jury on issues of law. (The opinion indicates that the Arizona constitution vests the justice court with jurisdiction in criminal misdemeanor matters. See 440 P.2d at page 1005.) The question presented to the court was whether "it is a violation of due process of law for a justice of the peace, who is not an attorney at law, to instruct the jury as to matters of law in a criminal proceeding" (440 P.2d 1005). On this issue the court concluded that allowing the justice of the peace to so instruct the jury was not fundamentally unfair or offensive to a fundamental principle and so proscribed by the Fourteenth Amendment.

In the *City of Decatur* v. *Kushmer,* 43 Ill. 2d 334, 253 N.E.2d 425 (1969) the defendant's jury trial resulted in conviction of maintaining a nuisance and a fine of $200 was imposed. The defendant argued before the Illinois Supreme Court that he was denied due process of law because his trial was conducted by a magistrate who was not a lawyer. In disposing of this argument, the court concluded (253 N.E.2d at p. 428):

> "In the absence of constitutional or statutory requirement, one need not be an attorney to be eligible to serve as a judge (30A Am.Jur., Judges, sec. 11; 48 C.J.S. Judges § 14), and this would appear to apply with even greater force to service as a magistrate."

In sum, the California Supreme Court has created an unwarranted extension of the due process clause

of the Fourteenth Amendment. Moreover, its decision has broad application to current prevailing practice in the majority of the states and to the qualifications for United States magistrates.

ARGUMENT

Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution Mandate Attorney Status for All Judges or Magistrates in Every Criminal Case in State Courts of Lowest Jurisdiction Where There Is a Possibility of a Jail Sentence Being Imposed on the Defendant?

This Court has repeatedly held that, under the Fourteenth Amendment, the states are free to establish court systems in accordance with their own conception of policy and fairness so long as fundamental rights are not abridged. *Tumey* v. *Ohio, supra,* 273 U.S. 510; *Snyder* v. *Commonwealth of Massachusetts, supra,* 291 U.S. 97. In accordance with this principle the People of California have provided, in their constitution and by statute, for the composition of the court system in California.

The California Constitution, article VI, section 5, provides that each county is divided into municipal court and justice court districts with districts of more than 40,000 residents having a municipal court and those of 40,000 or less having a justice court. The Legislature is vested with complete authority over the organization and jurisdiction of the justice courts and has provided that these courts have jurisdiction over misdemeanors punishable by fine of $1,000 or less or a maximum term of one year in county jail or both (California Penal Code section 1425).

The judges of justice courts are elected in their counties or districts at general elections (California Constitution, article VI, section 16, subdiv. (b)) to serve for a six-year term (Government Code section 71145). The Legislature, which also prescribes the necessary qualifications of justice court judges, has declared that to be eligible for such a position the candidate must either (1) be a member of the state bar or (2) have passed a qualifying examination prescribed by the judicial council or (3) have been an incumbent in a justice court or a predecessor court at the time the reorganization act of 1950 became operative and have retained that position continuously. (Government Code section 71601.)

The question of the qualifications for judges of the justice courts has been before the California Legislature regularly in recent years, and that body has consistently, following hearings, declined to impose the requirement of attorney status on these judges.[6]

The California Supreme Court in mandating attorney status to them through its application of the Fourteenth Amendment grounded its decision in the proposition that there was a "reasonable likelihood" that a fair trial could not be had before a non-attorney judge. The factors persuasive to that court on this issue were (1) that the non-attorney judge will be unable to deal with the complexity of the issues likely

[6] Compelled by the *Gordon* decision, the California Legislature has enacted conforming legislation to become operative only if that decision becomes final for all purposes including review by this Court. This legislation is printed as Appendix G hereto.

to be presented in the modern criminal trial, and (2) the increase in the number of attorneys and the improvement in the methods of transportation render inapplicable previously compelling reasons for allowing laymen to act as judges. (Appendix A p. 23.)

The record before the state court contained no evidence upon which to base the conclusion that attorneys were generally available in remote areas of California to act as justice court judges; nor was judicial notice the justification for its conclusion. "Modern standards and conditions" (Appendix A p. 19) constituted the *ratio decidendi* for the court's interpretation of the Fourteenth Amendment of the Federal Constitution. Presumably, such modern standards and conditions are present not only in California but also in the other 35 states in which non-attorney judges are permitted and in the federal system which authorizes non-attorney magistrates. Applicable here then would be the rule that a state court is not permitted to interpret federal constitutional rights independently of the fundamental criteria which this Court has engrafted onto the language of the constitutional provision in question. See *Chapman* v. *California,* 386 U.S. 18, 21 (1967) "with faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules and remedies designed to protect people from infractions by the States of federally guaranteed rights;" *Ker* v. *California,* 374 U.S. 23, 30-34 (1963) (Opinion of Clarke, J.); *Jacobellis* v. *Ohio,* 378 U.S. 184, 194–195

(1964): "The Court has explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the Nation would vary with state lines,' . . . It is, after all, a national Constitution we are expounding." A question squarely presented by this petition is whether the California Supreme Court can, as a matter of Federal Constitutional law, conclude upon no factual basis whatsoever, that modern standards and conditions, as a matter of due process require that all judges must be attorneys.

CONCLUSION

The right of the individual states, by constitutional provision and legislative enactment, to provide for the organization and composition of its court system has long been recognized in all of the states, the federal system and in England. The California Supreme Court erroneously concluded that the Fourteenth Amendment's due process provision is violated by the California Constitution and statutes authorizing a non-attorney to act as a judge of a justice court. Accordingly, its holding that the current practice of allowing non-attorney judges to preside over criminal trials or proceedings involving charges which carry the possibility of a jail sentence violates the constitu-

tional rights of the defendants under the due process clause of the Fourteenth Amendment of the United States was erroneous. We respectfully urge, therefore, that the Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

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OPINION

BURKE, Acting P. J.—We are confronted here with the question whether the current practice of allowing non-attorney judges to preside over criminal trials of offenses punishable by a jail sentence, as is the situation in over 60 percent of the justice courts in California, violates the constitutional rights of the defendants in those proceedings. We have decided that this practice does violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and that henceforth defendants in such courts are entitled to have an attorney judge preside over all criminal proceedings involving charges which carry the possibility of a jail sentence, unless such right is waived by the defendant or his counsel.

Petitioner Gordon was brought before a non-attorney judge of the Yuba City Justice Court to stand

trial for disturbing the peace and failing to disperse (Pen. Code, § § 415, 416). Similarly, petitioner Arguijo was brought before a non-attorney judge of the Grover City Justice Court to stand trial for driving under the influence of alcohol (Veh. Code, § 23102, subd. (a)). Both petitioners sought extraordinary pretrial relief, on behalf of themselves and all others similarly situated, contending that it is unconstitutional to compel them to stand trial on criminal charges before non-attorney judges. The superior court sustained a demurrer without leave to amend and petitioners have appealed.[1]

Presently in California each county is divided into municipal court and justice court districts with districts of more than 40,000 residents having a municipal court and those of 40,000 or less having a justice court. (Cal. Const., art. VI § 5.) The Legislature is vested with complete authority over the organization and jurisdiction of the justice courts (*id.*), and has provided that these courts have jurisdiction over misdemeanors punishable by a fine of $1,000 or less or a

[1] Since the filing of this appeal, both Gordon and Arguijo pleaded guilty to lesser charges before attorney judges. These events, however, have not rendered the case moot, for according to well established principles, "if a pending case poses an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot." (*In re William M.*, 3 Cal.3d 16, 23 [89 Cal.Rptr. 33, 473 P.2d 737], see also *Moore* v. *Ogilvie*, 394 U.S. 814 [23 L.Ed.2d 1, 89 S.Ct. 1493]; *Ballard* v. *Anderson*, 4 Cal.3d 873 [95 Cal.Rptr. 1, 484 P.2d 1345, 42 A.L.R.3d 1392]; *Zeilenga* v. *Nelson*, 4 Cal.3d 716 [94 Cal.Rptr. 602, 484 P.2d 578]; *DiGiorgio Fruit Corp.* v. *Dept. of Employment*, 56 Cal.2d 54 [13 Cal.Rptr. 663, 362 P.2d 487].)

maximum term of one year in county jail or both (Pen. Code, § 1425).[2]

The judges of justice courts are elected in their counties or districts at general elections (Cal. Const., art. VI, § 16, subd. (b)) to serve for a six-year term (Gov. Code, § 71145). The Legislature, which also prescribes the necessary qualifications of justice court judges, has declared that to be eligible for such a position the candidate must either (1) be a member of the State Bar or (2) have passed a qualifying examination prescribed by the Judicial Council or (3) have been an incumbent in a justice court or a predecessor court at the time the Reorganization Act of 1950 became operative and have retained that position continuously. (Gov. Code, § 71601.)[3]

[2] Justice courts also have jurisdiction over various types of civil cases (see Code Civ. Proc. § 112). The issue of the constitutionality of permitting a non-attorney judge to preside over these civil matters (and over "infractions" punishable by fine only) is not before us and we express no opinion on this subject. We also note that a judge of a justice court is authorized to act as a magistrate (Pen. Code, § 808) with power to conduct preliminary hearings in felony cases and to order the defendant to stand trial for his offense (Pen. Code, § 858 et seq.) Although petitioners were not charged with felony offenses and, accordingly, the question is not before us, we fail to see any distinction of consequence between misdemeanor trials involving a potential jail sentence, and felony preliminary examinations which present similar potential loss of freedom. Thus, a strong argument could be made that an attorney judge is essential to afford the defendant due process during the preliminary hearing.

[3] According to statistics furnished us by the Judicial Council, as of March 1974 there were 215 authorized judgeships in justice courts. Eighty-one of these positions were held by attorneys, 108 were held by laymen who have passed the qualifying examination given by the Judicial Council, 19 were held by laymen incumbents from the old system, and there were 7 vacancies.

Petitioners assert that to require a defendant to stand trial before a non-attorney judge in any case in which the defendant faces a potential jail sentence violates his right to due process of law.[4] We agree.

The justice of the peace judicial system, from which our current justice courts trace their ancestry, originated in England under Edward III in the early part of the 14th century. In that period and throughout the early part of this country's history, compelling reasons existed for allowing laymen to act as judges in the few simple matters that came within the jurisdiction of justices of the peace. There were not enough attorneys in rural areas to serve as justices of the peace, and a prohibition against non-attorney judges might have deprived many areas of any eligible judges. Travel and communication were slower and more burdensome, making it harder and even impossible for an attorney judge who normally resided and heard cases in a more populous urban area to preside over matters which arose in rural areas. (See generally Smith, *The Justice of the Peace System in the United States,* 15 Cal.L.Rev. 118.) Furthermore, it is likely that the trial of a criminal case was far less complex than in modern times. Even misdemeanor trials are now apt to involve complicated issues of law and procedure, requiring an expertise which a layman cannot be assumed to possess.

Whatever the justification for permitting laymen to preside over criminal trials in the 1800s, it is a well-recognized principle that even long-standing practices are subject to constitutional scrutiny and must meet

[4] Petitioners also raise other objections to the non-attorney judge system, including an equal protection challenge. However, as we agree with their due process argument we need not discuss their other contentions.

the advancing standards of due process. As Mr. Justice Frankfurter noted in *Wolf* v. *Colorado,* 338 U.S. 25, 27 [93 L.Ed. 1782, 1785, 69 S.Ct. 1359], "Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." (See also *Randone* v. *Appellate Department,* 5 Cal.3d 536, 551-552 [96 Cal. Rptr. 709, 488 P.2d 13]; *Blair* v. *Pitchess,* 5 Cal.3d 258, 279, fn. 13 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206]; cf. *Brown* v. *Board of Education,* 347 U.S. 483 [98 L.Ed. 873, 74 S.Ct. 686, 38 A.L.R.2d 1180]; *Brown* v. *Merlo,* 8 Cal.3d 855 [106 Cal.Rptr. 388, 506 P.2d 212]; *Zeilenga* v. *Nelson, supra,* 4 Cal.3d 716; *In re Antazo,* 3 Cal.3d 100 [89 Cal.Rptr. 255, 473 P.2d 999].)

The practice of allowing a layman to be a judge in a criminal proceeding must be scrutinized in the light of modern standards and conditions. There has been a vast increase in the number of attorneys in all areas of the state and substantial improvement in roads, highways and transportation. Furthermore, as discussed more fully below, the increased complexity of criminal law and criminal procedure has greatly enhanced the probability that a layman will be unable

to deal effectively with the complexities inherent in a criminal trial.

We note at the outset that we are dealing with a defendant's fundamental right to a fair trial,[5] a right which extends to *all* criminal trials, regardless of the nature of the crime with which defendant is charged. (*Argersinger* v. *Hamlin,* 407 U.S. 25 [32 L.Ed.2d 530, 92 S.Ct. 2006].)

In determining in advance of trial if a particular procedure or proceeding comports with the demands of due process, the courts have sought to ascertain whether in the absence of relief a *reasonable likelihood* exists that a fair trial cannot be had. (*Maine* v. *Superior Court,* 68 Cal.2d 375 [66 Cal.Rptr. 724, 438 P.2d 372]; *Frazier* v. *Superior Court,* 5 Cal.3d 287 [95 Cal.Rptr. 798, 486 P.2d 694]; see *Sheppard* v. *Maxwell,* 384 U.S. 333, 363 [16 L.Ed.2d 600, 620, 86 S.Ct. 1507].)[6]

Moreover, with respect to post-trial review, the United States Supreme Court has recognized for many years that the very character of certain procedures make it impractical to establish the degrees of prejudice which has resulted therefrom. (See *Ham-*

[5] "A fair trial in a fair tribunal is a basic requirement of due process." (*In re Murchison,* 349 U.S. 133, 136 [99 L.Ed. 942, 946, 75 S.Ct. 623].)

[6] In *Frazier* we stated, "Under the *Maine* rule, a change of venue must be granted when the defendant shows, as here, 'a reasonable likelihood that in the absence of such relief, a fair trial cannot be had.' . . . '[R]easonable likelihood' of prejudice does not mean that prejudice must be 'more probable than not' . . . a defendant is entitled to such relief [change of venue] 'not only when a preponderance of circumstances calls for such a result, but also whenever a defendant has shown *even* a "reasonable likelihood" that he will not receive a fair trial.' " (5 Cal.3d at pp. 294–295.)

ilton v. *Alabama,* 368 U.S. 52 [7 L.Ed.2d 114, 82 S.Ct. 157], and cases cited *infra.*) In these circumstances, the defendant need not show that he was *actually* prejudiced during his trial in order to establish a denial of due process of law; it is enough if he can show there was a reasonable *probability* of prejudice. (See *Ward* v. *Village of Monroeville,* 409 U.S. 57 [34 L.Ed. 2d 267, 93 S.Ct. 80] [traffic offender tried before a mayor of town which was heavily dependent on traffic fines]; *Sheppard* v. *Maxwell, supra,* 384 U.S. 333 [pretrial publicity]; *Estes* v. *Texas,* 381 U.S. 532 [14 L. Ed.2d 543, 85 S.Ct. 1628] [televised trials]; *Turner* v. *Louisiana,* 379 U.S. 466 [13 L.Ed.2d 424, 85 S.Ct. 546] [use of same deputy sheriffs as both jury custodians and as key prosecution witnesses]; *In re Murchison, supra,* 349 U.S. 133 [contempt trial before same judge who presided at the grand jury hearing during which alleged contempt occurred]; *Tumey* v. *Ohio,* 273 U.S. 510 [71 L.Ed. 749, 47 S.Ct. 437, 50 A.L.R. 1243] [judge receiving compensation from fines he imposed].)

We do not suggest that a fair criminal trial is impossible in a court presided over by a non-attorney judge, but only that the likelihood of such a trial would be substantially diminished. As mentioned above, a layman who is not an incumbent justice court judge may qualify as a candidate for election to that court by passing the three-hour examination given by the Judicial Council. We have scrutinized the most recent Judicial Council examination and, although it extends over a wide area of the law, the examination is far less rigorous than the two-and-one-half days State Bar examination required of one seeking to become an attorney. We also note the absence of any

requirement of college or law school education[7] in order to qualify as a justice court judge.

The United States Supreme Court has recognized that the legal and constitutional issues involved in a misdemeanor case may be as complex as those involved in a trial for a more serious offense. (See *Argersinger* v. *Hamlin, supra,* 407 U.S. 25, 33 [32 L.Ed.2d 530, 536].) There is little guarantee that the background of a nonattorney judge will have prepared him to recognize these issues and resolve them according to established legal principles.[8]

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[7] A study shows that in 1972, 37 percent of non-attorney justice court judges had no education beyond high school; at least 13 of these judges has not completed high school. (Hennessy, *Qualification of California Justice Court Judges: A Dual System,* 3 Pacific L.J. 439, 445–446.)

The Commission on Standards of Judicial Administration of the American Bar Association emphasizes the importance of a properly educated judiciary. In its Standards Relating to Court Organization (Final Draft 1974), section 1.21, subdivision (a), requires that all judges "should have a broad general and legal education and should have been admitted to the bar." (P. 29.) The Commentary on section 1.21 states that "Selecting competent judges is the most important aspect of establishing and maintaining an excellent court system.... [¶] They should have a breadth of education sufficient to understand the variety of problems that come before the courts. They should be professionally qualified as lawyers so that they can interpret and apply the law competently." (*Id.,* pp. 31–32.)

[8] Our analysis is supported by the findings of an extensive study commissioned by the Judicial Council (the same body that prepares the qualifying test for non-attorney judges). The study found that "Many Justice Courts are still staffed by lay judges who often are unfamiliar with or inexperienced in the complexities of modern court procedure and adjudication activities." (Booz, Allen & Hamilton, Inc., Unified Trial Court Feasibility Study, p. 24.) "The use of lay judges to handle cases requiring legal background and training, insights and attitudes ... can create problems in the adjudication of cases. The need for legal training for judges has become increasingly important in view of the complexities brought about by recent court decisions regarding the constitutional rights of criminal

A judge may encounter many difficult legal problems in the course of a misdemeanor trial. For example, defendant Gordon was charged with disturbing the peace and failure to disperse at a political demonstration in front of a local sheriff's office. Even if a non-attorney judge would recognize the relevant First Amendment issues, he probably would have difficulty determining whether Gordon had engaged in protected activities.

Equally difficult legal problems may arise with respect to evidentiary matters in a misdemeanor trial. For example, defendant Arguijo was charged with drunken driving. Had his attorney challenged either the accuracy of the scientific apparatus used to measure blood alcohol, or the qualifications of those administering the test, it is probable a non-attorney judge would have been unable to rule properly on the admissibility of the evidence.

A justice court judge must also be competent to preside over jury trials.[9] Sophisticated determinations regarding the *voir dire* of jurors, the prejudicial effect of evidence and argument, and the submission of proper jury instructions will be required. Legal training may often be necessary to deal adequately with these complex and technical problems.

A further responsibility of a justice court judge concerns the acceptance of guilty pleas. The judge

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defendants. The technicalities of the law play a prominent role today in the legal process." (Booz, Allen & Hamilton, Inc., California Lower Court Study, pp. 27–28.)

The report recommended establishing a single type of lower court "to insure that a full-time attorney judge is available for each judicial district." (California Lower Court Study, p. 25.)

[9] Under article I, section 7, of the state Constitution, defendant has a right to trial by jury in all criminal cases, regardless of the severity of the potential punishment.

must determine that the accused understands the nature of the charge, the elements of the offense, and the consequences of his guilty plea. Moreover, the judge must determine that there exists a basis in fact for the plea, and that the plea is freely and voluntarily made. (*Boykin* v. *Alabama,* 395 U.S. 238 [23 L.Ed. 2d 274, 89 S.Ct. 1709]; *Mills* v. *Municipal Court,* 10 Cal.3d 288 [110 Cal. Rptr. 329, 515 P.2d 273]; *In re Tahl* 1 Cal.3d 122 [81 Cal.Rptr. 577, 460 P.2d 449]; *In re Johnson,* 62 Cal.2d 325 [42 Cal. Rptr. 228, 398 P.2d 420]; Pen. Code, §1192.5.) We are not convinced that a non-attorney judge will be able to perform these critical duties satisfactorily.

We are likewise concerned that a non-attorney judge may lack the expertise necessary to make proper sentencing decisions. As we noted recently, "If a trial judge lacks the necessary expertise to make proper sentencing decisions, the answer does not lie in conditioning its exercise upon the consent of the prosecutor but in better trained and selected judges . . . ." (*People* v. *Navarro,* 7 Cal.3d 248, 259, fn. 7 [102 Cal. Rptr. 137, 497 P.2d 481].)

The Attorney General argues that the defendant's right to appeal from a justice court judgment is a sufficient guarantee of due process. We disagree, for as we stated in *Maine* v. *Superior Court, supra,* 68 Cal.2d 375, 378, "Availability of appeal often falls short of sufficient protection [of a defendant's fundamental right to a fair trial], since 'the burden, expense and delay involved in a trial render an appeal from an eventual judgment an inadequate remedy.' (*Brown* v. *Superior Court* (1949) 34 Cal.2d 559, 562

[212 P.2d 878].)"[10] Moreover, an appeal from a justice court judgment is particularly inadequate to guarantee a fair trial since justice courts are not courts of record (Cal. Const., art. VI, § 1), and thus no transcript is ordinarily made of the original proceeding. If there is no transcript an appeal would be based solely upon a statement of the case settled or prepared by the non-attorney judge himself.

The United States Supreme Court has recognized that the complexities involved in defending oneself in a criminal trial are beyond the capabilities of the average layman untrained in the laws (*Gideon* v. *Wainwright*, 372 U.S. 335 [9 L.Ed.2d 799, 83 S.Ct. 792, 93 A.L.R.2d 733].[11] Furthermore, defendant's fun-

[10] The Supreme Court expressed a similar belief in *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. 57, 61–62 [34 L.Ed.2d 267, 271–272], where it stated, "Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance."

[11] In holding in *Gideon* that "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours," (372 U.S. at p. 344 [9 L.Ed.2d at p. 805]), the court quoted with approval from *Powell* v. *Alabama*, 287 U.S. 45, 68–69 [77 L.Ed. 158, 170–171, 53 S.Ct. 55, 84 A.L.R. 527], wherein Mr. Justice Sutherland wrote, "The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. *Even the intelligent and educated layman has small and sometimes no skill in the science of law.* If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction

damental right to the assistance of counsel is guaranteed to him regardless of the severity of the punishment he faces if convicted. (Cal. Const., art. I. § 13; see *Argersinger* v. *Hamlin, supra,* 407 U.S. 25; *In re Smiley,* 66 Cal.2d 606 [58 Cal. Rptr. 579, 427 P.2d 179; *In re Johnson, supra,* 62 Cal. 2d 325.) Since our legal system regards denial of counsel as a denial of fundamental fairness, it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process.[12]

The People point out that the courts of several states have concluded that the use of non-attorney judges is consistent with the demands of due process. (See *Ditty* v. *Hampton* (Ky. 1972) 490 S.W.2d (app. dism. 414 U.S. 885 [38 L.Ed.2d 133, ---- S.Ct. ----]); *Crouch* v. *Justice of Peace Court of Sixth Precinct* (1968) 7 Ariz.App. 460 [440 P.2d 1000]; cf. *City of Decatur* v. *Kushmer* (1969) 43 Ill.2d 334 [253 N.E.2d 425, 428] [magistrate not an attorney].) Yet none of these cases convincingly resolved the inherent inconsistency in guaranteeing a defendant an attorney to

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because he does not know how to establish his innocence." (Italics added.)

These words take on even greater significance when we note that recently the Supreme Court stated, "Both *Powell* and *Gideon* involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty." (*Argersinger* v. *Hamlin, supra,* 407 U.S. 25, 32 [32 L.Ed.2d 530, 536].)

[12] The reports commissioned by the Judicial Council (see fn. 8, *ante*), reached a similar conclusion, "It is incongruous today for prosecutors and defense attorneys, who must be licensed attorneys, to perform advocacy roles before a judge who does not have a similar background. The [non-attorney] judge is placed in a position of either drawing upon his own experience (which may be limited) or relying upon the position taken by the prosecutor or defense attorney." (Unified Trial Court Feasibility Study, p. 28.)

represent him without providing an attorney judge to preside at the proceedings. As we have seen, a defendant's right to a fair trial may be substantially abridged by the use of a non-attorney judge.

We acknowledge that the justice court system in California has operated with remarkable efficiency under the general supervision of the Judicial Council. "California was, of course, one of the first states, through its qualifying examination, institutes [conferences and panel discussions among judges], and *California Justice Court Manual,* to lead the way toward better qualified lay judges." (Hennessy, *supra,* 3 PacificL.J. at p. 470.) Moreover, we recognize the valuable contribution which non-attorney judges have made. "The great majority of the lay justice court judges now serving in California have demonstrated that nonlawyers who are interested, competent and dedicated to the work of the courts can perform an important role in the efficient administration of justice." (*Id.,* p. 474.) Yet, as we have explained, so long as a reasonable likelihood exists that a non-attorney judge will be unable to afford a defendant a fair trial, due process requires that the system be further refined.

It has been suggested that our holding could cause serious practical problems in view of the asserted scarcity of attorney judges in certain rural areas throughout this state. We recognize that there will be problems and have sought to minimize them to the extent constitutionally possible. We do not abolish the existing system permitting the use of non-attorney judges in all matters within the justice court jurisdiction. Such judges may continue to function in civil cases, and in criminal cases not involving potential jail sentences. Moreover, even in criminal cases where a

jail sentence may be imposed, the non-attorney judge may act so long as defendant or his counsel waives the due process right to have the proceedings presided over by an attorney judge. Such right may be voluntarily relinquished just as the right to counsel may be relinquished. In the event defendant or his counsel fails to so stipulate and no attorney judges are available in the district, then either the cause could be transferred to another judicial district in the same county (see Pen. Code, § 1035), or the Judicial Council could assign an attorney judge from another area to hear the matter (see Cal. Const., art. VI, § 6).

The principle we announce today is not a novel one. It dates back at least to 1215 and the Magna Carta (§ 45) where it was written, "We will not make men justices, constables, sheriffs, or bailiffs, unless they are such as know the law of the realm, and are minded to observe it rightly." We conclude that, under today's advanced standards, due process demands that henceforth [13] a defendant charged with an offense carrying a possible jail sentence must be provided with an attorney judge to preside over the proceedings, unless he elects to waive such right.

The judgment is reversed.

McComb, J., Tobriner, J., Clark, J., Draper, J.,* Molinari, J.,* and Caldecott, J.,* concurred.

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[13] In order to avoid disrupting pending criminal proceedings over which a non-attorney justice court judge is presiding, and in view of the widespread reliance upon the probable validity of the existing justice court system, we hold that our ruling herein shall apply only to those criminal trials which commence on or after the date on which this decision becomes final under rule 24 of the California Rules of Court.

* Assigned by the Chairman of the Judicial Council.

APPENDIX B

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

LEWIS GORDON et al., *Plaintiffs and Appellants,* v. THE JUSTICE COURT FOR THE JUDICIAL DISTRICT OF SUTTER COUNTY et al., *Defendants and Respondents;* THE PEOPLE, Real Party in Interest and Respondent.	SAC 7995 Sup. Ct. No. 210521 SUPREME COURT FILED Sept. 26, 1974 G. E. BISHEL *Clerk* *Deputy*

MODIFICATION OF OPINION

By the Court:

The opinion herein appearing at 12 Cal.3d 323, is ordered modified by striking therefrom the entire language of footnote 13 appearing at page 334 and substituting in lieu thereof the following: "In view of the widespread reliance upon the validity of the justice court system and the administrative problems in providing attorney judges for criminal trials, our ruling herein shall apply only to those criminal trials commencing on or after February 1, 1975.

[Draper, J., Molinari, J., and Caldecott, J., sitting in place of Wright, C.J., Mosk, J., and Sullivan, J., who deemed themselves disqualified.]

APPENDIX C

Lewis GORDON and Santiago Arguijo, individually and on behalf of all other persons similarly situated, Petitioners and Appellants,

v.

The JUSTICE COURT OF YUBA CITY, SUTTER COUNTY, California, et al., Respondents;

The PEOPLE of the State of California, Real Party in Interest and Respondent.

Civ. 13384.

Court of Appeal, Third District.

July 3, 1973.

As Modified July 18, 1973.

Hearing Granted Sept. 6, 1973.

Burton D. Fretz, Cal. Rural Legal Assistance, Santa Maria, for petitioners and appellants.

Harry Woolpert, San Luis Obispo, Burt Danziger, Marysville, James D. Lorenz, Jr., San Francisco, Peter Haberfeld, Los Angeles, Marshall Hartman and Nancy Goldberg of Nat'l. Legal Aid & Defender Assn., Chicago, Ill., amicus curiae for petitioners-appellants.

Evelle J. Younger, Atty. Gen., by Charles P. Just, Deputy Atty. Gen., Sacramento, for respondents.

Charles Kaplan, Los Angeles, for amicus curiae.

DAVID,* Associate Justice.

I. NATURE OF THE CASE. Petitioners appeal from a judgment, after a demurrer sustained without leave to amend, rejecting their claim that their pending misdemeanor trials would deny them due process of law, and equal protection of the laws, in that the

* Assigned by the Chairman of the Judicial Council.

justice of the peace presiding had never been admitted to the bar, and because other misdemeanants by the facts of geography and the action of the authorities were afforded trials in like cases, before lawyer justices

Urging that due process and equal protection of the laws is denied, per se, to all those who may be tried on criminal charges before lay justices, the action is asserted to be a class action on their behalf. As to Gordon and Arguijo, the named defendants, the action is moot. Each long since pleaded guilty, and sentences were pronounced on charges pending against them (while others were dismissed). Counsel persist in maintaining the appeal, as a "class action."[1]

II. MOOTNESS. With the stalking-horses for the test suit scratched from the action, we face the rule that our duty is " 'to decide actual controversies . . . and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue .... ' " (Consol. Corp. v. United etc. Workers (1946) 27 Cal.2d 859, 863, 167 P.2d 725, 727.) Whether improvidently or not this court denied a motion to dismiss upon this ground, because of possible public interest and because until now, there has been no definitive legal ruling in California upon the issues presented. (Diamond v.

[1] We do not reach the question of whether this is a proper class action (c.f., Gerhard v. Stephens (1968) 68 Cal.2d 864, 69 Cal.Rptr. 612, 442 P.2d 692; City of Chino v. Superior Court (1967) 255 Cal.App.2d 747, 63 Cal.Rptr. 532; Barber v. California Emp. Stab. Com. (1954) 130 Cal.App.2d 7, 278 P.2d 762); nor whether the individual justices, asserted to be unqualified, are indispensable parties. (Code Civ.Proc. § 389; cf., Miracle Adhesives v. Peninsula Tile Assn. (1958) 157 Cal.App. 2d 591, 595, 321 P.2d 482; Beaumont v. Samson (1907) 5 Cal. App. 491, 494, 90 P. 839; Town of Susanville v. Long (1904) 144 Cal. 362, 365, 77 P. 987.)

Bland (1970) 3 Cal.3d 653, 657, 91 Cal.Rptr. 501, 477 P.2d 733.)

III. BACKGROUND CONSIDERATIONS. Unless there is a constitutional requirement otherwise, the general rule is that a judge need not be an attorney. (30A Am. Jur., Judges, § 11; 48 C.J.S. Judges § 14, and cases cited.) A few recent cases reject the contentions made by appellants. (Crouch v. Justice of the Peace Court of Sixth Precinct (1968) 7 Ariz.App. 460, 440 P.2d 1000; Melikian v. Avent (D.C.N.D.Miss.1969) 300 F.Supp. 516; Ditty v. Hampton (Ky.App. 1972), 490 S.W.2d 772.) While disqualifying mayors, as judges, for probable bias because of their financial interest in the fines collected, the United States Supreme Court did not disqualify them as judges because they were laymen. (Dugan v. Ohio (1928) 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed 784; Tumey v. Ohio (1926) 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, judges' pay under a fee system is disqualifying; Ward v. Village of Monroeville (1972) 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267, accord, disqualification where there was a union of duty to raise city revenues, and the power to levy fines.) Under Florida law, determination of probable cause for the issuance of warrants by a court clerk, not a lawyer or judge, has been held within his capabilities and not inhibited by due process considerations, where he was impartial and independent. (Shadwick v. City of Tampa (1972) 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783.)

IV. HISTORICAL. The development of the office of justice of the peace is sketched briefly in Frazier v. Moffatt (1951) 108 Cal.App.2d 379, 383-384, 239 P.2d 123. In England, its beginnings have been

traced to 1264, when by statute, custodians of the peace were organized.

In the United States, the justice court became traditionally the court of almost every organized township, a court of the people close to everyman's door. The right of the citizen to be judged by his fellows in small legal matters, as well as the large, embraced more than the composition of the juries, but extended to the justice of the peace as well; where not to be a lawyer was an asset with a distrustful public, rather than a liability, in early America.

Originating in local self-government, this office like most others was subject to the egalitarian insistence that in America, any man might be elected or appointed to it. The public has been ambivalent. Permitting only minimum formal requirements on the one hand, but recognizing the perils of amateurism on the other, the public has provided countervailing checks and balances to limit errant vagaries of official action. As applied to justice courts in California, these are considerable.[2]

[2] They include: (1) mandamus to compel action, and prohibition to restrain the assertion of jurisdiction; (2) appeal; (3) review of judicial conduct by the Judicial Qualifications Commission, and the Supreme Court; (4) a defendant is entitled to counsel, and if indigent, counsel is to be provided; (Argersinger v. Hamlin (1972) 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530); (5) challenge of a judge for cause is provided by Code of Civil Procedure section 170; and one challenge upon simulated cause without substantiation (a statutory "king's-ex") is afforded; (6) magisterial action in holding a defendant over for trial in the superior court is reviewed by that court; (7) in search and seizure cases, the motion to exclude evidence may be renewed in the superior court (Pen. Code, §§ 1510, 1538.5); (8) informations can be attacked in the superior court, for want of probable cause, as well as indictments (Pen.Code, § 995); (9) habeas corpus may be used to review improper convictions and confinement (Pen.Code, § 1474; In re Martha (1954) 122 Cal.App.2d 654, 265 P.2d

The opinion of the learned trial judge[3] noted: "Article 6 of the California Constitution deals with the California Court System. Section 1 specifies and enumerates the five Courts of the State and provides that all but the Justice Courts are Courts of record. Section 15 specifies the qualifications of Judges of the Courts of record, requiring them to have been lawyers . . . ." No qualification is specified for justice court judges, save that the Legislature shall prescribe them. "Article 6, Section 5 provides for the establishment and maintenance of Justice Courts and Judges thereof according to geographical districts and population. This *being so, the use of nonlawyer judges in one area and the use of lawyer Judges in a neighboring area are matters which have received the express blessing of the California Constitution."

The Legislature discharged its duty to prescribe the qualifications of justices of the peace, by the enactment of Government Code section 71601.[4]

527; In re Delgado (1930) 107 Cal.App. 688, 290 P.589; In re Pate (1939) 33 Cal.App.2d 641, 92 P.2d 643; In re Williams (1920) 183 Cal. 11, 190 P. 163); (10) egregious albeit legal conduct on the part of a justice of the peace may defeat him for reelection (cf., Frazier v. Moffat (1951) 108 Cal.App. 2d 379, 385, 239 P.2d 123).

[3] We are pleased to acknowledge and adopt portions of the excellent and perceptive opinion of Honorable George E. Paras in the trial court; and unless indicated otherwise by the context, quotation marks throughout this opinion show such adoption.

[4] Section 71601. "Judge; qualifications. No person is eligible to the office of judge of a justice court unless he either has been admitted to practice before the State Supreme Court or has within four years preceding his election or appointment passed a qualifying examination under regulations prescribed by the Judicial Council. So long as a person who qualifies for the office of judge by passing such examination remains an incumbent of such office, he shall be eligible to election or reelection to such office. This section does not apply to the incumbent of a superseded inferior court who succeeds to the office of judge of a justice court or is elected to such office at

We take notice of the constitutions and statutes of our sister states in respect to judicial qualifications, reference to which is tabulated in the brief of amici curiae, on behalf of appellant. In Massachusetts and New Hampshire, no legal qualifications are stated for any judicial office. The inferior courts, variously named as justice courts, magistrates, mayor's courts, police courts, and city courts, are found in all states. Non-lawyer judges are permitted in such courts in all but fifteen states, though in some states there are classes of such courts in which the justice must be a lawyer.

In Tumey v. State of Ohio, supra, 273 U.S. 523, 47 S.Ct. 441, the court states:

"All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion. . . . [I]n determining what due process of law is, under the Fifth or Fourteenth Amendment, the court must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, which were shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." And at page 534, 47 S.Ct. at page 445, the court further stated: "It is, of course, so common to vest the mayor of villages with inferior

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the first election of judges pursuant to the Municipal and Justice Court Act of 1949 or the provisions of law succeeding that act, or who seeks re-election to such office. (Added Stats. 1953, c. 206, p. 1283, § 1, as amended Stats.1959, c. 735, p. 2724, § 1.)"

judicial functions that the mere union of the executive power and the judicial power in him cannot be said to violate due process of law."

We have further guidance from the United States Supreme Court as to its reluctance to declare violative of due process, a practice which is traditional and of long standing. In Jackman v. Rosenbaum (1922) 260 U.S. 22, 31, 43 S.Ct. 9, 67 L.Ed. 107, the court states:

"The Fourteenth Amendment, itself a historical product, did not destroy history for the states and substitute mechanical compartments of law all exactly alike. If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . ."

We need not review the long history of the justice courts in California, culminating in the Municipal and Justice Court Act of 1949 (Stats. 1949, ch. 1510), consolidating courts such as police courts, city courts, recorder's courts and the justice courts.[5] Fifty-one municipal court districts were established. In the rural areas, there was strong opposition to abolition of laymen justices, and Government Code section 71601 was the resulting compromise, calling for a qualifying examination of non-lawyers becoming candidates for such judgeships. Since 1953, the Judicial Council has given such tests, and they have become progressively more difficult.

[5] Counsel have cited the informative article, Qualification of California Justice Court Judges by Mary T. Hennessy (1972) 3 Pac.L.J., p. 439, et seq., which sketches the history of the justice courts in California, and is a ready reference to Judicial Council studies and action respecting such courts.

V. DETAILS CONCERNING PETITIONERS AND THEIR CONTENTIONS.

"The petitioners are Lewis Gordon and Santiago Arguijo, who are defendants accused of misdemeanor crimes in the Yuba City Justice Court and the Grover City Justice Court, respectively. Respondents Judge Miller and Judge Dana are non-lawyer Judges of the foregoing two respondent Justice Courts. Judge Miller was elected to his office (Yuba) in 1961 after becoming eligible by passing a special qualifying examination prescribed by the respondent Judicial Council of the State of California. Judge Dana was elected to his office (Grover City) in 1958 and presumably passed a similar examination. Constitutional questions are involved in the Justice Court cases of both petitioners.

"Motions were made by both petitioners to disqualify Judges Miller and Dana upon the ground of their lack of qualifications, which motions were denied. These were not preemptory challenges under CCP § 170.6, but were made under CCP § 170.8, thus presenting to the Justice Court the same constitutional questions as in this case. Both motions were denied.

"This suit was thereafter filed as a class action by petitioners in behalf of themselves and others similarly situated, against the respondent Courts and Judges thereof and all other Justice Courts and their Judges similarly situated, i. e., having and being non-lawyer Judges.

"It is to be noted that petitioners do not direct their attack individually against the two named Judges and do not assert or maintain that either of them has any specific lack of qualifications not

common to all other non-lawyer Justice Court Judges. The sole basis for the claim of lack of qualification is the absence of lawyer status. Indeed this is necessarily so, if this action is to be maintained as a class action; otherwise there would be absent the common questions of fact and law necessary to a class action. Petitioners maintain that the use of *any* non-lawyer Judge to preside over their trial, per se and without more, would violate their constitutional rights; as to Judges Dana and Miller, neither of them is claimed to be less qualified than any other non-lawyer Judge . . . .

"Petitioners rest their due process contentions upon the basic constitutional right of every defendant to a fair trial. This right is claimed violated by trial before a lay Judge because [allegedly] such a Judge has inadequate training to grasp complex constitutional questions, is more likely to make errors of law, is more susceptible to advice from law enforcement people, is unable to further educate himself due to an inadequate law library, and is more apt to be swayed by his own personal prejudices as well as by local pressures. Because there are nearby districts or geographical areas wherein the same conduct of petitioners would be tried by lawyer Judges, petitioners claim a denial of equal protection of the laws."

"The qualifying requirements of Government Code § 71601 are not retroactive. Thus California now has a substantial number of non-lawyer Justices of the Peace a good many of whom (44 according to the petition—Paragraph 20) have never taken a qualifying examination. These Judges (who have not passed a qualifying examination) constitute a separate class which is not separately represented, there being no member of that class named as a party.

Parker v. Bowron [1953] 40 C[al.] 2d 344 [254 P.2d 6]. It is however included within the greater class of Judges who were never lawyers."[6]

In the petition, "Numerous examples are given of misconduct on the part of non-lawyer Judges, including four charges of improper rulings by Judge Dana (Exhibits V, X, Z and CC) and one charge against Judge Dana's clerk (Exhibit T). Attitudes of certain non-lawyer Justice Court Judges are described (Exhibits M, P, BB and DD). Opinions of knowledgeable persons as to the advisability and propriety of non-lawyer Judges are expressed (Exhibits J, N, and HH). Comments regarding the content and adequacy of the Judicial Council's tests for qualification of non-lawyer Justices of the Peace are given (Exhibits F, G, H, I, and J). Impressions of litigants in Justice Courts are included (Exhibits O, Q, R and S). The absence of adequate law libraries in Justice Courts is noted (Exhibit M)."

The general demurrer to the petition admitted the truth of all well-pleaded facts, but not the conclusions of law, nor allegations of facts of which the court may take judicial notice. (Griffin v. County of Colusa (1941) 44 Cal.App.2d 915, 918, 113 P.2d 270; Saltares v. Kristovich (1970) 6 Cal.App.3d 504, 510, 85 Cal.Rptr. 866, and cases cited.) Since affidavits are not receivable for any purpose, save verification of the pleading, incorporation by reference in the

[6] As of May 22, 1972, the official files of the Judicial Council show "There are currently 221 justice courts in the state, with four of the courts having a vacancy in the office of judge. The total of 217 justice court judges includes 80 lawyers, 117 non-lawyer examinees and 20 laymen incumbents blanketed in during the 1951 reorganization of the lower courts." Current data concerning Justice Courts is found in the 1973 Judicial Council Report, pages 307–316, 229–232, 161, 41–42, 259.

pleading affords them no greater standing. (Code Civ.Proc. § 2009.) The trial court was privileged to take judicial notice of the reports of the Judicial Council, and the Administrative Office of the California Courts, and we do. (Witkin, Cal.Evidence 2d (1966) §§ 154, 167; Evid.Code, § 450, comment.) "[I]n the consideration of a pleading the court must read the same as if it contained a statement of all the matters of which they are required to take judicial notice, even when the pleading contains an express allegation to the contrary." (Chavez v. Times-Mirror Co. (1921) 185 Cal. 20, 23, 195 P. 666, 668.)

From the 1973 Judicial Council Report, pages 307 and 230, we learn that in the year 1971–1972, justice courts in California handled 981,607 nonparking filings, which included felony preliminaries and misdemeanors not elsewhere classified. From the same report, page 230, it appears that 12,279 were felony preliminaries. From all of the municipal and justice courts in the same period throughout the state, there were only 2,126 appeals to the appellate departments of the superior court on questions of law—the criminal case—and approximately one-half of these were in Los Angeles County, which has only two justice courts, one with an attorney justice. (*Id.* at p. 259.) The other (Catalina) had only 321 nonparking filings for the year 1971–1972. (*Id.* at p. 310.)

Appellants claim there is a greater likelihood of judicial error when there is a non-lawyer judge presiding. This is probably mere supposition. The Fourteenth Amendment in its due process and equal protection clauses does not assure uniformity of judicial decisions, or immunity from judicial error. Otherwise, every judicial error would present a federal question. (Beck v. Washington (1962) 369 U.S. 541,

554–555, 82 S.Ct. 955, 8 L.Ed.2d 98, 110.) A judge satisfies the requirements of due process of law when he is fair, impartial and honest. The fact that he may commit error, be he a lawyer or non-lawyer, does not negate these qualities. If an individual judge is error-prone, no doubt his constituents will consider this at the next election, and if this reaches a stage of incompetence, the Commission on Judicial Qualifications may act.

The expanded protections to the accused afforded in late decisions bearing the due process label, cross-cutting the field of constitutional safeguards, have been definite enough in the enunciation of legal doctrine. The difficulties arise in application of the doctrines to the facts at hand. It is not established that a layman judge or layman jury is any more apt to err in this process than a lawyer or a judge. Prejudicial error as to the defendant's right or the conduct of the trial may set a defendant free, safe from double jeopardy. The rights of the People suffer in such instances, where there is no effective right of appeal on the whole cause. (Pen. Code, §§ 1235, 1237, 1238, 1259, 1260.) Judicial error thus may work to the advantage of the defendant, and this advantage is the result of due process of law, and not the lack of it.

"It is persuasively argued by petitioners that the right to counsel implies the right to a Judge who can comprehend counsel. But it does not follow that a Judge who is not or was not a lawyer cannot comprehend counsel. Nor does it follow that because constitutional questions raised at the Justice Court level are complex, they cannot be comprehended by Judges who are not lawyers. If this were so, what of the hundreds of legislators throughout the country who

are constantly involved in the enactment of legislation involving subjects with constitutional considerations? It could be similarly argued that they are not competent to consider or pass upon such laws. What of the executive departments of the State and Federal Governments? Those who propose so many laws and who enforce them surely cannot be said to fail to comprehend them because they are not lawyers.

"Whether a Judge in a given case comprehends counsel before him on constitutional questions depends upon the ability and willingness of the individual Judge to devote the necessary time and effort to a comprehension of the matters before him; not upon whether he possesses a law degree. It can be argued that a lawyer is more likely to possess these propensities than a non-lawyer, but this only involves us in a discussion of preferences, not constitutional rights."

When lawyers assert that a justice of the peace does not comprehend counsel, there may not be any actual "communication gap" but only the fact that comprehension does not presuppose agreement.

The possession of a license to practice law does not ipso facto invest a practicing lawyer, whether tyro or Nestor at the bar, with special knowledge or aptitudes in criminal law and procedure. Although the ambit of his study and experience may be limited to working practicalities which come before him, an experienced non-lawyer judge may be far more knowledgeable than many lawyers who appear before him on petty cases, and even on preliminary hearings. Such information as has been presented concerning the background capabilities of these justices dispels any suggestion that they are incompetent because they have not formally

passed the State Bar examination to become lawyers.[7] Even before written qualification examinations were established, some laymen justices of the peace were serving as such. One cannot assume that they have learned nothing in such a period. The fact that they have retained their judgeships over such a period tends to indicate community satisfaction, a desirable factor in judicial administration.

The Legislature, it seems to us, cannot be faulted for lack of affirmative action to eliminate this class of justices, where attrition due to retirement, disability and death will phase it out. As was said in Salsburg v. Maryland (1953) 346 U.S. 545, 550, 74 S.Ct. 280, 283, 98 L.Ed. 281, 288: " 'To be able to find fault with a law is not to demonstrate its invalidity. . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' "

"It is argued that the rural setting increases the probability of judicial bias where a non-attorney Judge presides. This argument cannot be accepted at all, for it applies equally to lawyers and non-lawyers. Conceding that such bias exists, deriving from the rural nature of Justice Courts, there is absolutely no merit to a claim that a law degree [or admission to the bar] will somehow magically immunize the lawyer Judge from such bias."

"Rural bias" presumably does not refer to any condition affecting the citizens of the judicial district,

[7] Consult Hennessy, op. cit., 3 Pac.L.J., pages 444–448. Profile of the California Justice Court Judge. A great number have college degrees; some have been graduated in law without having passed the bar. Others are engaged in law studies. Fourteen of the lay judges are women. Thirty-five were formerly peace officers.

served by the justice of the peace. If it is assumed that the outsider is at a disadvantage, this pertains to municipal and superior courts as well. While they may be challenged for cause, and challenged peremptorily without any, jurors may be the ones most provincial in viewpoint. Yet, change of venue requires more than folklore concerning such attitudes to sustain a plea that a fair trial cannot be obtained.

"The same holds for the argument that lay Justice Court Judges get advice from district attorneys or law enforcement personnel or are subject to local political pressures. How a Judge approaches his duties is up to the individual Judge. With whom he confers, by what he is influenced, why he functions as he does, are all subjective considerations applicable to any Judge, regardless of his background. There is nothing inherently suspect above the fact that he may not have a law degree," or may not have been admitted to the bar.

No doubt there have been, and perhaps are, some judges who once were admitted to the bar, who maintain a reputation for sound judgment, sustained by the advice of their clerks, reporters, and fellow judges with whom they have rapport. Where the information and advice is sound, it should matter little whether it was derived from the attorneys before him, the lectures of a law school professor, the Continuing Education of the Bar, or from friends at hand. There are ample means of protection against disqualifying bias or prejudice.

If in an individual case, a misdemeanor defendant feels that the judge is biased and prejudiced (for reasons of local pressures or for any other reasons), he has a remedy under Code of Civil Procedure section 170, subdivision 5.

"Petitioners herein have the right of appeal if they are tried and convicted. But it is claimed by them that this remedy of appeal is inadequate, for a number of reasons. They are: (1) the distinction between a right to trial de novo on a civil appeal from a Justice Court and only a right of review on such an appeal in a criminal case; (2) there is no adequate record guaranteed on appeal; (3) a review on appeal does not always reflect or consider all the error of the trial Court, only the prejudicial error; (4) a reversal on appeal can never undo the harm done by the trial Court; and (5) the correctness of the trial Court result is presumed on appeal."

These arguments are substantially rebutted by the language of St. Joseph Stock Yards v. United States (1935) 298 U.S. 38, 84, 56 S.Ct. 720, 740, 80 L.Ed. 1033, 1058: "But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of fact by an administrative tribunal would be broader than their power to set aside a jury's verdict. The Constitution contains no such command."

"The 3rd, 4th and 5th contentions are applicable to all appeals in all cases; hence they cannot support petitioners' due process contention. The first contention has no merit for the same reason. Review on appeal with a retrial by the same trial Court in case of reversal is the rule; trial de novo is the exception." The constitutional requirements for the record on appeal from a justice court in a misdemeanor case are stated in March v. Municipal Court (1972) 7 Cal.3d 422, 428, and the United States Supreme Court cases cited therein. It is presumed all courts will comply,

until proved otherwise in a given case. Any assumption that nonlawyer justices will not is gross speculation. Nothing in plaintiffs' second contention impels reversal of the judgment herein.

VI. DUE PROCESS OF LAW. There are at least two general approaches to "due process of law." In Gray v. Hall (1928) 203 Cal. 306, 318, 265 P. 246, 252, our State Supreme Court stated: "Due course of law under the state Constitution and due process of law under the Federal Constitution mean the same thing. [Citation.] It is the right of a litigant to have his cause tried and determined under the same rules of procedure that are applied to other similar cases, and when this is afforded to him he has no ground to complain that due process of law is not being observed."

Assuming that there is procedural due process, achieved through application of established legal procedures and norms, there must be a fair trial, before an impartial tribunal, at which the defendant may be heard. There is the absence of due process if the trial is infected with procedures or practices which violate "traditional concepts of fundamental fairness."[8]

VI. DUE PROCESS UNDER THE CALIFORNIA CONSTITUTION. In interpreting the Constitution of California, no preference may or should be given to any part over any other part. Applying this standard, the use of lay judges in misdemeanor trials cannot possibly violate any provision of the California Constitution, because that very instrument establishes the distinctions between the

[8] Consult: People v. Gonzales (1942) 20 Cal.2d 165, 170, 124 P. 2d 44.

qualifications of judges in the various courts, and directs the Legislature to determine the qualifications of judges in justice courts. Applying the rule of "expressio unius" we must conclude that the constitution does not forbid the qualifications set up by the Legislature. As to the Legislature, the constitution is a limitation, and not a grant of its unrestricted powers. (Fitts v. Superior Court (1936) 6 Cal.2d 230, 234, 57 P. 2d 510.)

Since it does appear that the justice courts of California have been reorganized, and judicial qualifications upgraded, any failure of the Legislature to go further makes apropos the language of the United States Supreme Court in McDonald v. Bd. of Election Com. of Chicago (1969) 394 U.S. 802, at 809, 89 S.Ct. 1404, at 1408, 22 L.Ed.2d 739, at 745–746:

"Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. [Citations.] With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind' [citation]; and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked."

Petitioners place considerable importance on the role of the non-lawyer judge in preliminary hearings. For such purposes, they sit as magistrates. The hearing usually is no more determinative of the

ultimate innocence or guilt, than the issuance of a warrant. Both involve the determination of "probable cause."

In Shadwick v. City of Tampa (1972) 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783, it was held that although clerks of municipal courts were not lawyers or judges, they qualified as neutral and detached magistrates; and nothing in the Fourth Amendment prohibited them from so acting. Before the Federal Magistrate's Act of 1968 (82 Stats. 1107) United States Commissioners were held impliedly to be independent judicial officers for the purpose, though many of them were not lawyers or judges. (*Id.*, 407 U.S. at p. 348, 92 S.Ct. at p. 2121, 32 L.Ed.2d at p. 787.) The court in its unanimous decision stated (407 U.S. at p. 351, 92 S.Ct. at p. 2123, 32 L.Ed.2d at p. 789):

"Judges themselves take office under differing circumstances. Some are appointed, but many are elected by legislative bodies or by the people. Many enjoy but limited terms and are subject to re-appointment or re-election. . . . We will not vault requirements for the independence of a municipal clerk to a level higher than that prevailing with respect to many judges. . . .

"Appellant likewise has failed to demonstrate that these clerks lack capacity to determine probable cause. . . . We presume from the nature of the clerk's position that he would be able to deduce from the facts on an affidavit before him whether there was probable cause to believe a citizen guilty of impaired driving, breach of peace, drunkenness, trespass or the multiple other common offenses

covered by a municipal code. There has been no showing that this is too difficult a task for a clerk to accomplish. Our legal system has long entrusted nonlawyers to evaluate more complex and significant factual data than that in the case at hand. Grand juries daily determine probable cause prior to rendering indictments, and trial juries assess whether guilt is proved beyond a reasonable doubt. The significance and responsibility of these lay judgments betray any belief that the Tampa clerks could not determine probable cause for arrest."

Significantly for the matter at hand, the Supreme Court stated (407 U.S. at p. 352, 92 S.Ct. at p. 2124, 32 L.Ed.2d at p. 790): "What we do reject today is any per se invalidation of a state or local warrant system on the ground that the issuing magistrate is not a lawyer or judge. Communities may have sound reasons for delegating the responsibility of issuing warrants to competent personnel other than judges or lawyers. . . . All this is not to imply that a judge or lawyer would not normally provide the most desirable review of warrant requests. But our federal system warns of converting desirable practice into constitutional commandment. It recognizes in plural and diverse state activity one key to national innovativeness and vitality. States are entitled to some flexibility and leeway in their designation of magistrates, so long as all are neutral and detached and capable of the probable cause determination required of them." (Fns. omitted.)[9]

[9] In California, the case of Serenko v. Bright (1968) 263 Cal.App. 2d 682, 692, 70 Cal.Rptr. 1, involved the matter of a claim that it is a denial of due process to permit non-lawyer referees to adjudicate license revocation hearings in the Motor Vehicle Department. The court held that due process is not violated by this practice, following the precedent of Anderson v. Board of Dental Examiners (1915) 27 Cal.App. 336, 149 P. 1006.

The People of the State of California have expanded the legal or judicial experience requirements for judges of courts of record over the years. They might impose a requirement of experience as members of the state bar upon all persons elected or appointed as justices of the peace, either by constitutional amendment or by legislative enactment. The judicial history of the state shows this has been proposed, and rejected. The failure to adopt what some consider to be in the public interest (such as television in a courtroom) does not per se condemn justice court trials as unfair.

Generally a showing of identifiable prejudice is required in due process cases. (Beck v. Washington, supra, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed. 2d 98.) In Snyder v. Commonwealth of Massachusetts (1933) 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674, the United States Supreme Court put the matter this way: "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. [Citations.] Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."

VII. DUE PROCESS UNDER THE FEDERAL CONSTITUTION. "The Constitution of the United States is of course the supreme law of the land, and controls rules, laws or practices sanctioned by any State. The Fourteenth Amendment guarantees due process and equal protection to all persons; petitioners claim that each of these guarantees is violated

by California's Court structure, to the extent that it permits them to be tried by non-lawyer judges. . . .

". . . . . .

"Under the due process clause of the Federal Constitution, the petitioners, as well as all persons, possess the basic right to a fair trial. Tumey vs. State of Ohio 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749]. The right to counsel is guaranteed to all criminal defendants, ... In Re Smiley, 66 C2d [Cal.] 606 [58 Cal.Rptr. 579, 427 P.2d 179]. Counsel of course must be qualified counsel, licensed to practice in this State. Government Code § 6000 et seq. Petitioners argue that it must follow that the Judge who presides over the trial of a misdemeanor case must also possess at least the qualifications of a lawyer, otherwise the right to counsel is meaningless and no fair trial can be had."

The Kentucky Court of Appeals in Ditty v. Hampton, supra, 490 S.W.2d 772, 774, properly remarked: "The function of the court is not to defend the accused or represent him, but to decide fairly and impartially. An accused needs counsel to defend him, as pointed out in Gideon v. Wainwright because the government employs lawyers to prosecute him—because our system of criminal justice is an adversary system. But the judge is not one of the accused's adversaries, and is not there either to defend or to prosecute him. So the fact that the accused needs a lawyer to defend him does not mean that he needs to be tried before a lawyer judge."

If the inadequacies of his counsel reduce the trial to a farce or sham, an accused may assert a denial of due process. By analogy, if the inadequacies of a trial judge reduce the trial to a farce or sham,

there is a denial of due process. But it does not follow that trial with a non-lawyer in the justice's bench *per se* reduces the trial to such a level. The denial of due process in such instances is established, if at all, by the proceedings in an individual trial, not as a matter of wholesale presupposition.

We do not repeat here references to the federal cases considered earlier in this opinion. As applied to the issues involved, they do not support the claim of appellants that there is a denial of due process of law in permitting non-lawyers to serve as justices of the peace.

"One final and very fundamental reason exists which prohibits any speculation as to whether the Federal Constitution forbids the use of non-lawyer Judges in misdemeanor trials. United States Supreme Court Justices possess the greatest judicial power in the land over all cases within the scope of Federal jurisdiction, including constitutional questions; from their decision there is no further appeal. Justices of the Peace have by comparison extremely limited jurisdiction, and their decisions are subject to review on appeal. It would be a bizarre conclusion indeed if the Federal Constitution were held to require a law degree for Justices of the Peace if it does not require one for the Chief Justice of the United States Supreme Court. The Constitution provides specifically for certain qualifications of certain Federal officials, including the President; it imposes no restriction whatever upon those who might hold the office of Supreme Court Justice. See Footnote on page 1167, Watson on the Constitution. It must be concluded that since the Federal Constitution does not require that United States

Supreme Court Justices be lawyers, it does not impose that requirement upon Justices of the Peace."

VIII. EQUAL PROTECTION. In Whittaker v. Superior Court (1968) 68 Cal.2d 357, 367 et seq., 66 Cal.Rptr. 710, 438 P.2d 358, after reviewing the authorities on the subject, the California Supreme Court states at page 370, 66 Cal.Rptr. at page, 720, 438 P.2d at page 368: "The principle which we derive from these cases . . . is this: Legislative classification as to treatment and procedure within a state judicial system according to factors such as geographical area, population, or other relevant considerations, does not deny equal protection of the laws unless such classification is shown to be palpably arbitrary and without a sound basis in reason."

"Tested against this rule, the equal protection claim of petitioners must fail. Within the geographical areas of Justice Court jurisdiction, all persons are treated the same. There is no 'inherent unfairness' involved, nor anything of a 'hostile or invidious' nature, such as to offend the spirit of equal protection."

The intrinsic validity of classification of judicial districts, some of which will have laymen as judges, while others require lawyers, has been sustained by our courts, as well as others in similar situations. (Consult: Shea v. Kerr (1934) 1 Cal.2d 604, 606, 36 P.2d 189; cf., Samuels v. Hite (1950) 35 Cal.2d 115, 216 P.2d 879; In re Bartz (1955) 47 Wash.2d 161, 287 P.2d 119; State ex rel. Lindsey v. Derbyshire (1914) 79 Wash. 227, 140 P. 540, 544: "Where the exact line between the larger and smaller populations should be drawn is necessarily a matter of legislative discretion." Again, "[a]ll presumptions favor the

legislative classification, which cannot be overturned unless plainly arbitrary. [Citations.] If the Legislature could have acted upon any conceivably reasonable ground, the courts must assume that the Legislature acted upon such basis." (Fraenkel v. *Bank of America* (1953) 40 Cal.2d 845, 849, 256 P.2d 569, 571; cf., City of Walnut Creek v. Silveira (1957) 47 Cal.2d 804, 811, 306 P.2d 453; Whittaker v. Superior Court, supra, 68 Cal.2d 357, 66 Cal.Rptr. 710, 438 P.2d 358.)

While it may be true as asserted by appellants that some justice courts are near populous centers, it likewise is true that some non-lawyer justices serve in remote areas. Neither the volume of cases nor the financial ability of the community justify full-time service. In some counties, if a lawyer was elected justice of the peace, no other lawyers would remain in the county to appear before it. In 24 districts where the justice of the peace was a layman, it was determined in 1967 that the number of available attorneys varied from none to 29 in those districts; in some of those districts, no attorneys had sought the office, and in others attorneys who had sought to be elected were rejected by the voters. (Qualifications of California Justice Court Judges by Mary T. Hennessy (1972) 3 Pac.L.J. 439, 456.)

The 1973 Judicial Council of California Annual Report (p. 230) states: "In 1971–72 filings ranged from a low of 16 to a high of 21,285 per judge in the justice courts, with an average caseload of 4,343 cases per judge. Municipal courts, in comparison, had an average caseload of 13,827 cases per judge. The smaller number of filings in most justice courts is accounted for by the fact that justice courts are generally located in the less populous areas of the

state. Approximately two-thirds of the justice courts had less than 5,000 cases filed, while only seven courts had filings exceeding the average per judge caseload of the municipal courts . . . ."

Such circumstances suggest valid reasons sustaining the legislative classification.

In Ditty v. Hampton, supra, 490 S.W.2d 772, 776, the Kentucky court stated: "We can conceive of the following possible reasonable basis for the classification here in question:

"1. The greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously (not necessarily with more fairness and impartiality).

"2. Lawyers with whom to staff the courts are more available in the larger cities.

"3. The larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts. Cf. Metcalf v. Howard, 304 Ky. 498, 201 S.W.2d 197. That population and area factors may justify classifications within a court system has long been recognized. See Missouri v. Lewis, 101 U.S. 22, 25 L.Ed. 989. . . .

"The reasonableness of the bases for the classification in issue must be measured in the light of the possible detriment that members of the public may suffer from the classification. There has been no showing in this case that nonlawyer police judges, proportionately, convict more defendants, impose higher sentences, or are reversed more on appeal than lawyer judges. There is no basis for any finding that they are less fair and impartial in cases in which the defendant, as he is entitled, is represented by counsel, or that their ignorance of the law harms the accused more than the government. There is no support for the assertion

that the nonlawyer judge, generally, will accept the prosecutor's version of the law rather than that of defense counsel.

"We conclude that the bases for the classification reasonably justify the classification in the balance of the bases against possible detriment factors."

If a defendant is denied equal protection of the law, because he appears before a non-lawyer judge, whereas, in the adjacent district the justice of the peace is required to be a lawyer, why cannot the defendant in that district claim a denial of equal protection of law, in that in the next district, a judge of the municipal court trying the same misdemeanors was required to have been a member of the state bar for five years immediately preceding selection, or to have served as a judge of a court of record in the state for that period? Or if he was before such a judge in a municipal court, could he validly claim unequal protection of the laws because a judge of the superior court, trying misdemeanors on a reduction of charges has been required to have such qualifications for ten years preceding his selection to that court? We apprehend the answer must be "no."

The United States Supreme Court has spoken on this question unequivocally. In McGowan v. Maryland (1961) 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393, a Sunday closing law was held valid, notwithstanding numerous exemptions. It was held that the equal protection clause was not violated, by the fact that retailers in one county were exempted from the law. The court stated (at p. 427, 81 S.Ct. at p. 1106): "But we have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite."

In judicial organization, Maryland uniquely provided separate judicial systems in different counties. Before the cases with which we are familiar now, illegally obtained evidence was banned in some courts, but allowed in others. This diversity was alleged to deny equal protection of the laws. The United States Supreme Court in Salsburg v. Maryland, supra, 346 U.S. 545, 550, 74 S.Ct. 280, 283, 98 L.Ed. 281, held: "We find little substance to appellant's claim that distinctions based on county areas are necessarily so unreasonable as to deprive him of the equal protection of the laws guaranteed by the Federal Constitution. The Equal Protection clause relates to equality between persons as such rather than between areas. This was established long ago in a decision which upheld a statute of Missouri requiring that, in the City of St. Louis and four counties, appeals be made to the St. Louis Court of Appeals, whereas appeals made elsewhere in that State must be directed to the Supreme Court of Missouri." Quoting from Missouri v. Lewis (1879) 101 U.S. 22, 31, 101 L.Ed. 989, to the same effect, and stating: "If diverisities of laws and judicial proceedings may exist in the several States without violating the . . . Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State."

The appellants have relied upon Shapiro v. Thompson (1969) 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600. The established doctrine there stated was that if a state classification restricts a "fundamental right" a "compelling state interest" must justify the restriction. There being no constitutional right to trial by a lawyer-justice in a justice court, or fundamental protected interest invaded, the *Shapiro* case is not applicable.

The "possibility" that under assumed circumstances the defendant might be under certain disadvantages has been equated by appellants with "probability." There are perhaps only a few legal situations which could not possibly arise. But when the judicial system is attacked generally, and not in reference to specific individual deprivations of right, it cannot be overturned because of "possible" deprivations of right without considering whether or not they are "probable." One definition of "probable" is that which is expected to happen, subject to slight doubt, in given circumstances (cf., People v. Jaurequi (1956) 142 Cal.App.2d 555, 559, 298 P.2d 896); or more apt to happen than not, "supported by evidence strong enough to establish presumption but not proof." (Webster's Seventh New Col. Dict. (1967).)

In its progressive upgrading of the court system, we affirm the conclusions of the trial court that the use of non-lawyer judges in certain justice courts, as provided by the Legislature under the permissions of the state constitution conforms to procedural due process; and that the use of non-lawyer judges does not offend "some principle of justice rooted in the traditions and conscience of our people as to be ranked as fundamental." (Snyder v. Commonwealth of Massachusetts, supra, 291 U.S. 105, 54 S.Ct. 330, 78 L.Ed. 677.) Accepting due process as a living principle, advancing standards or changing conditions have not yet made the lawyer judge in all justice courts a condition necessary to fundamental fairness, nor the absence of a lawyer judge in some of the justice courts "shocking to the universal sense of justice." (Cf., Gray v. Whitmore (1971) 17 Cal.App.3d 1, 20, 94 Cal.Rptr. 904, 914; People v.

Troche (1928) 206 Cal. 35, 42, 273 P. 767; City of Los Angeles v. Oliver (1929) 102 Cal.App. 299, 323, 283 P. 298; Kalloch v. Superior Court (1880) 57 Cal. 134, 135.)

Judicial imposition of a requirement upon a state to insist upon a law degree (or admission to the bar) as a prerequisite to judicial qualification at the justice court level would be to legislate affirmatively an arbitrary minimum standard. The contents of the petition, including the specific instances of misconduct attributed to certain non-lawyer judges, are proper to be directed to the Legislature for its consideration. The Legislature can adopt such a standard. This court cannot and should not legislate it into existence under the guise of constitutional compulsion.

There being no violation of the equal protection clauses of our constitutions, and no denial of due process of law under either to appellants or to the class they allegedly represent, the judgment is affirmed, with costs to respondents.

RICHARDSON, P. J., and FRIEDMAN, J., concur.

Hearing granted; WRIGHT, C. J., MOSK and SULLIVAN, JJ., did not participate.

MOLINARI, DEVINE and HAROLD C. BROWN, JJ., sitting.

APPENDIX D

ENDORSED:

Filed Aug. 5, 1971
W. N. DURLEY, Clerk
By Douglas L. Farewell, Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

LEWIS GORDON, SANTIAGO ARGUIJO, individually and on behalf of all other persons similarly situated,

Petitioners,

vs.

THE JUSTICE COURT OF YUBA CITY, SUTTER COUNTY, CALIFORNIA; JUDGE CLAUDE J. MILLER, Yuba City Justice Court; THE JUSTICE COURT OF GROVER CITY, SAN LUIS OBISPO COUNTY, CALIFORNIA; JUDGE G. S. DANA, Grover City Justice Court; and all Justice Courts similarly situated within the State of California; THE JUDICIAL COUNCIL OF THE STATE OF CALIFORNIA; RALPH KLEPS, Administrative Director to the Judicial Council, State of California; STATE OF CALIFORNIA,

Respondents,

PEOPLE OF THE STATE OF CALIFORNIA,
Real Parties in Interest.

NO. 210521
DEPT. 15

Ruling on Demurrer

I. THE FACTS

A general demurrer to the petition as amended has been interposed, thus admitting for purposes of this

ruling the truth of the matters alleged. These allegations, together with applicable laws, and information of which the court may take judicial notice, constitute the facts with which we deal in this case.

The petitioners are Lewis Gordon and Santiago Arguijo, who are defendants accused of misdemeanor crimes in the Yuba City Justice Court and the Grover City Justice Court, respectively. Respondents Judge Miller and Judge Dana are non-lawyer Judges of the foregoing two respondent Justice Courts. Judge Miller was elected to his office (Yuba) in 1961 after becoming eligible by passing a special qualifying examination prescribed by the respondent Judicial Council of the State of California. Judge Dana was elected to his office (Grover City) in 1958 and presumably passed a similar examination. Constitutional questions are involved in the Justice Court cases of both petitioners.

Motions were made by both petitioners to disqualify Judges Miller and Dana upon the ground of their lack of qualifications, which motions were denied. These were not peremptory challenges under CCP § 170.6, but were made under CCP § 170.8, thus presenting to the Justice Court the same constitutional questions as in this case. Both motions were denied.

This suit was thereafter filed as a class action by petitioners in behalf of themselves and others similarly situated, against the respondent Courts and Judges thereof and all other Justice Courts and their Judges similarly situated, i.e., having and being non-lawyer Judges.

Numerous examples are given of misconduct on the part of non-lawyer Judges, including four charges of improper rulings by Judge Dana (Exhibits V, X, Z and CC) and one charge against Judge Dana's clerk (Exhibit T). Attitudes of certain non-lawyer

Justice Court Judges are described (Exhibits M, P, BB and DD). Opinions of knowledgeable persons as to the advisability and propriety of non-lawyer Judges are expressed (Exhibits J, N and HH). Comments regarding the content and adequacy of the Judicial Council's tests for qualification of non-lawyer Justices of the Peace are given (Exhibits F, G, H, I and J). Impressions of litigants in Justice Courts are included (Exhibit O, Q, R and S). The absence of adequate law libraries in Justice Courts is noted (Exhibit M).

Article 6 of the California Constitution deals with the California Court System. Section 1 specifies and enumerates the five Courts of the State and provides that all but the Justice Courts are Courts of record. Section 15 specifies the qualifications of Judges of the Courts of record, requiring them to have been lawyers — no qualification is specified for Justice Court Judges. Government Code § 71601 sets forth the need for Justice Court candidates to pass a qualifying examination prescribed by the Judicial Council in order to be eligible for that office. This law was enacted in 1953 and thereafter the Judicial Council prescribed a test which has since been revised and made more difficult.

The qualifying requirements of Government Code § 71601 are not retroactive. Thus California now has a substantial number of non-lawyer Justices of the Peace a good many of whom (44 according to the petition — Paragraph 20) have never taken a qualifying examination. These Judges (who have not passed a qualifying examination) constitute a separate class which is not separately represented, there being no member of that class named as a party.

Parker v. Bowron, 40 C 2d 344. It is however included within the greater class of Judges who were never lawyers.

II. THE CONTENTIONS OF PETITIONERS

Petitioners contend that to permit them to be tried in a criminal case by Judges who are non-lawyers violates their rights under the due process and equal protection clauses of both the Federal and California Constitutions. It is to be noted that petitioners do not direct their attack individually against the two named Judges and do not assert or maintain that either of them has any specific lack of qualification not common to all other non-lawyer Justice Court Judges. The sole basis for the claim of lack of qualification is the absence of lawyer status. Indeed this is necessarily so, if this action is to be maintained as a class action; otherwise there would be absent the common questions of fact and law necessary to a class action. Petitioners maintain that the use of *any* non-lawyer Judge to preside over their trials, per se and without more, would violate their constitutional rights; as to Judges Dana and Miller, neither of them is claimed to be less qualified than any other non-lawyer Judge (see pages 6 and 7 of petitioner's reply brief filed May 19, 1971).

Petitioners rest their due process contentions upon the basic constitutional right of every defendant to a fair trial. This right is claimed violated by trial before a lay Judge because such a Judge has inadequate training to grasp complex constitutional questions, is more likely to make errors of law, is more susceptible to advice from law enforcement people, is unable to further educate himself due to

an inadequate law library, and is more apt to be swayed by his own personal prejudices as well as by local pressures. Because there are nearby districts or geographical areas wherein the same conduct of petitioners would be tried by lawyer Judges, petitioners claim a denial of equal protection of the laws.

III. THE CONTENTIONS OF RESPONDENTS

Respondents have demurred generally, claiming that the petition as amended states no cause of action or ground for relief. Their contentions are:

A. That petitioners have an adequate remedy at law, by appeal, by the right to use a peremptory challenge of a single Judge, etc.

B. That petitioner Gordon has no standing to claim the benefit of the United States Supreme Court due process cases (dealing with the right of trial by jury) because he is charged with "petty" offenses involving less than six months imprisonment at maximum.

C. That there is a failure to join a necessary party defendant, Chief Justice Wright, as Chairman of the Judicial Council.

D. That the mere use of lay Justices of the Peace in misdemeanor cases violates neither due process nor equal protection rights of defendants. This contention truly presents the central issue in the case.

This Court is prepared to resolve the demurrer on the basis of the constitutional question. It is therefore unnecessary to consider or discuss the points raised by respondents' contentions outlined in Paragraphs A, B and C above.

IV. THE CALIFORNIA CONSTITUTION

In interpreting the Constitution of California no preference may or should be given to any part over any other part. Applying this standard, the use of lay Judges in misdemeanor trials cannot possibly violate any provision of the California Constitution because that very instrument establishes and condones the practice of which petitioners complain.

As heretofore noted, the California Constitution specifies the five types of Judges who exercise judicial powers in this State. All Judges except those of Justice Courts require membership in the State Bar of California as a condition of their qualification for selection. By the application of the "expressio unius" rule of construction we must conclude that the California Constitution not only does not forbid but actually condones the use of non-lawyer Judges in Justice Courts.

Article 6, Section 5 provides for the establishment and maintenance of Justice Courts and Judges thereof according to geographical districts and population. This being so, the use of non-lawyer Judges in one area and the use of lawyer Judges in a neighboring area are matters which have received the express blessing of the California Constitution.

It is thus impossible to argue that the California Constitution forbids that which it clearly creates and fosters. Therefore it is concluded that no violation of State constitutional rights of petitioners is shown by the facts pleaded, and their contentions in this regard must be rejected.

V. THE FEDERAL CONSTITUTION

The Constitution of the United States is of course the supreme law of the land, and controls rules, laws

or practices sanctioned by any State. The Fourteenth Amendment guarantees due process and equal protection to all persons; petitioners claim that each of these guarantees is violated by California's Court structure, to the extent that it permits them to be tried by non-lawyer Judges. Each of these contentions will be separately dealt with.

A. Due Process

Under the due process clause of the Federal Constitution, the petitioners, as well as all persons, possess the basic right to a fair trial. Tumey vs. State of Ohio, 273 US 510. The right to counsel is guaranteed to all criminal defendants, at least in California. In Re Smiley, 66 C2d 606. Counsel of course must be qualified counsel, licensed to practice in this State. Government Code §6000 et seq. Petitioners argue that it must follow that the Judge who presides over the trial of a misdemeanor case must also possess at least the qualifications of a lawyer, otherwise the right to counsel is meaningless and no fair trial can be had.

Initially we must distinguish between that which is desirable and that which is mandated by the Constitution. Few lawyers, if any, who have practiced for any length of time and who have appeared before all of our trial Courts, would ever quarrel with the contention that is is preferable to have lawyer Judges in the Justice Courts. Indeed it was undoubtedly such considerations that historically took us from 1879 when only Supreme Court and Superior Court Judges had to be lawyers, to 1904 when District Court of Appeal Judges had to be lawyers, to 1924 when Municipal Court Judges also became subject to that requirement. See Historical Note, West's California Constitution Annotated, Vol. 2, P. 439. And it must

have been such considerations which caused the California Legislature in 1953 to require the testing of Justice Court Judges to qualify them for office. Government Code §71601. The question before us is not what the practicing lawyer personally prefers, nor what the petitioners prefer, nor what this Court feels is more desirable; the question is what the Federal Constitution compels.

For reasons of their own, the People of the State of California, having progressed from the virtual nonexistence of any requirement for legal background of Judges to such a requirement for all Supreme, Appellate, Superior and Municipal Court Judges, have stopped short of imposing that requirement as to Justice Courts. An extension of a State Bar membership requirement to Justice Court Judges is within the power of the People of this State, through their Legislature or by direct constitutional amendment; but this has not been done—and presumably for good sound reasons. May it now be said that this failure of California to require that Justice Courts be manned by lawyer Judges has left misdemeanor defendants deprived of their constitutional right to a fair trial?

It must also be re-emphasized that petitioners ground their claim upon the *sole* basis that the mere absence of a professional background on the part of Justice Court Judges results in a likelihood of an unfair trial. No specific charge of bias or incompetence is lodged against either respondent Judge; only that by virtue of the lack of a law degree the class of non-lawyer Judges cannot competently sit in judgment of an accused misdemeanant, thus depriving him of a fair trial. Conceding all the allegations of the petition to be true, accepting as proven all the specific instances of misconduct, ineptness, and impropriety on

the part of lay Judges enumerated in the Exhibits to the petition, does it follow that the absence of a law degree of the presiding Judge, in and of itself, creates such a probability that the accused will not receive a fail trial as to violate his right to due process of law?

In Snyder vs. Commonwealth of Massachusetts, 291 US 97, the United States Supreme Court put the matter this way:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conceptions of policy and fairness, unless in so doing it affects some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the Bar." (Page 105)
>
> "Due process of law requires that the proceedings shall be fair, but fairneess is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against any possible hardship that may befall." (Pages 116 and 117)

In Tumey vs. State of Ohio, 273 U.S. 510, after confirming the basic proposition that persons acting in a judicial capacity are disqualified by an interest in the controversy, the Court states:

> "All questions of judicial qualification may not involve constitutional validity. Thus matters of

kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion . . . in determining what due process of law is, under the Fifth or Fourteenth Amendment, the Court must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, which were shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." (Page 523)

We have further guidance from the United States Supreme Court in the matter of the reluctance to declare unconstitutional as violative of due process a practice which is traditional and of long standing. In Jackman vs. Rosenbaum, 260 US 22, the Court states:

"The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for 200 years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . ." (Page 31)

Commenting on the fact that 48 states of the United States have deemed the use of television in a courtroom during trial proceedings improper, thus establishing a usage or custom in that regard, the United States Supreme Court states in Estes vs. Texas, 381 US 532:

"This fact is most telling in buttressing our conclusion that any change in procedure which would permit its use would be inconsistent with our concepts of due process in this field." (Page 544)

In support of petitioners' contentions, we have the following language from Tumey vs. State of Ohio, supra:

> "Every procedure which would offer a possible temptation to the average man as a Judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law." (Page 552)

Generally a showing of identifiable prejudice is required in due process cases. Beck vs. Washington 369 US 541. On the other hand, where a procedure is such as to involve a probability that prejudice will result, such procedure will be deemed inherently lacking in due process. If the practice is inherently suspect, the person claiming the denial of due process has carried his burden. Estes vs. Texas, supra.

On the specific question of the constitutionality of the use of lay Judges against a claim of denial of due process, we have a scarcity of cases, the point being quite new. In the only case in which the direct contention was made the Arizona Appellate Court rejected the contention. Crouch vs. Justice of the Peace Court, 7 Ariz. App. 460. In California, the case of Serenko vs. Bright, 263 CA 2d 682, involved the matter or a claim that it is a denial of due process to permit non-lawyer referees to adjudicate license revocation hearings in the Motor Vehicle Department; the Court held that due process is not violated by this practice, following the precedent of Adams vs. Board of Dental Examiners, 27 CA 236.

The United States Supreme Court has given us this indirectly pertinent dictum on the subject:

> "It is, of course, so common to vest the mayor of villages with inferior judicial functions that the mere union of the executive power with the judicial power in him cannot be said to violate due process of law." Tumey vs. Ohio, supra, at p. 534.

It is persuasively argued by petitioners that the right to counsel implies the right to a Judge who can comprehend counsel. But it does not follow that a Judge who is not or was not a lawyer cannot comprehend counsel. Nor does it follow that because constitutional questions raised at the Justice Court level are complex, they cannot be comprehended by Judges who are not lawyers. If this were so, what of the hundreds of legislators throughout the country who are constantly involved in the enactment of legislation involving subjects with constitutional considerations? It could be similarly argued that they are not competent to consider or pass upon such laws. What of the executive departments of the State and Federal Governments? Those who propose so many laws and who enforce them surely cannot be said to fail to comprehend them because they are not lawyers.

Whether a Judge in a given case comprehends counsel before him on constitutional questions depends upon the ability and willingness of the individual Judge to devote the necessary time and effort to a comprehension of the matters before him; not upon whether he possesses a law degree. It can be argued that a lawyer is more likely to possess these propensities than a non-lawyer, but this only involves

us in a discussion of preferences, not constitutional rights.

It is claimed that there is a greater likelihood of judicial error when there is a non-lawyer Judge presiding. The due process clause does not insure against judicial errors. The Judge satisfies due process when he is fair, impartial, and competent; the fact that he may commit error, be he a lawyer or a non-lawyer, does not negate these qualities. The claim that a non-lawyer Judge is more likely to commit error is a matter to be urged upon the People of this State and directed to their legislative powers, not to this Court as a matter of a per se denial of due process.

It is argued that the rural setting increases the probability of judicial bias where a non-attorney Judge presides. This argument cannot be accepted at all, for it applies equally to lawyers and non-lawyers. Conceding that such bias exists, deriving from the rural nature of Justice Courts, there is absolutely no merit to a claim that a law degree will somehow magically immunize the lawyer Judge from such bias.

The same holds for the argument that lay Justice Court Judges get advice from district attorneys or law enforcement personnel or are subject to local political pressures. How a Judge approaches his duties is up to the individual Judge. With whom he confers, by what he is influenced, why he functions as he does, are all subjective considerations applicable to any Judge, regardless of his background. There is nothing inherently suspect above the fact that he may not have a law degree.

It is argued that non-lawyer Judges do not have adequate law libraries. While this tells us perhaps that local monetary budgets should be increased so as to furnish law libraries to all Justice Courts, it does not tell us either that lay judges do not have the means available to educate themselves on the law or that they are collectively incompetent to a point where misdemeanor defendants are being thereby denied due process.

To the extent that in an individual case a misdemeanor defendant feels that the Judge is biased and prejudiced (for reasons of legal pressures or for any reasons), he has a remedy under CCP §170(5). To the extent that he feels he did not receive a fair trial, he has the right of appeal. As stated by petitioners, the St. Josephs' Stockyards case, 298 US 38, gives us the guideline as follows:

> "The supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceeding in which facts were adjudicated was conducted regularly." (Page 84)

The foregoing language of the St. Josephs' case dealt with review of a proceeding of an administrative agency rather than with an appeal to a higher Court from an inferior Court. The enunciated rule, however, is certainly no less applicable to the latter circumstance.

Petitioners herein have the right of appeal if they are tried and convicted. But it is claimed by them that this remedy of appeal is inadequate, for a number of reasons. They are: (1) the distinction between a right to trial de novo on a civil appeal from a Justice Court and only a right of review on such an appeal in a

criminal case; (2) there is no adequate record guaranteed on appeal; (3) a review on appeal does not always reflect or consider all the error of the trial Court, only the prejudicicial error; (4) a reversal on appeal can never undo the harm done by the trial Court; and (5) the correctness of the trial Court result is presumed on appeal.

These arguments are substantially rebutted by the language of the St. Josephs' case commencing with the second sentence following the foregoing quotation:

> "But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a Court. If it did, the power of courts to set aside findings of fact by an administrative tribunal would be broader than their power to set aside a jury's verdict. The constitution contains no such command."

The 3rd, 4th and 5th contentions are applicable to all appeals in all cases; hence they cannot support petitioners' due process contention. The first contention has no merit for the same reason. Review on appeal with a retrial by the same trial Court in case of reversal is the rule; trial de novo is the exception. The second contention is answered by the repeated approval by our courts of a settled statement in the face of due process arguments. Magezis vs. Municipal Court 3 C 3d 54; Herick vs. Municipal Court, 8 CA 3d 967; Cleveland vs. Municipal Court, 18 CA 3d 207.

Summarizing the due process contentions, it is the view of this Court that the Legislature concerns itself with specific laws and regulations which provide precision and exactitude; whereas the Constitution and the interpretation the Courts place upon it, can

only act as a check against legislative infringement upon basic rights. The former acts affirmatively; the latter negatively. To impose a requirement upon a State to insist upon a law degree as a prerequisite to judicial qualification at the Justice Court level would be to affirmatively legislate an arbitrary minimum standard. The contents of the petition, including the specific instances of misconduct attributed to certain non-lawyer Judges, are strong arguments to be directed to the Legislature for its consideration. The Legislature can and perhaps should adopt such a standard; this Court cannot and should not legislate it into existence under the guise of constitutional compulsion. The simple question here is whether the California judicial system is unconstitutional to the extent that it allows trials in misdemeanor cases by non-lawyer Justices of the Peace. It does not.

One final and very fundamental reason exists which prohibits any speculation as to whether the Federal Constitution forbids the use of non-lawyer Judges in misdemeanor trials. United States Supreme Court Justices possess the greatest judicial power in the land over all cases within the scope of Federal jurisdiction, including constitutional questions; from their decision there is no further appeal. Justices of the Peace have by comparison extremely limited jurisdiction, and their decisions are subject to review on appeal. It would be a bizarre conclusion indeed if the Federal Constitution were held to require a law degree for Justices of the Peace if it does not require one for the Chief Justice of the United States Supreme Court. The Constitution provides specifically for certain qualifications of certain Federal officials, including the President; it imposes no restriction

whatever upon those who might hold the office of Supreme Court Justice. See Footnote on page 1167, Watson on the Constitution. It must be concluded that since the Federal Constitution does not require that United States Supreme Court Justices be lawyers, it does not impose that requirement upon Justices of the Peace.

B. Equal Protection

In Whittaker vs. Superior Court 68 C 2d 370, after reviewing the authorities on the subject, the California Supreme Court states:

> "The principle which we derive from these cases . . . is this: Legislative classification as to treatment and procedure within a state judicial system according to factors such as geographical area, population, or other relevant considerations, does not deny equal protection of the laws unless such classification is shown to be palpably arbitrary and without a sound basis in reason." (Page 370)

Tested against this rule, the equal protection claim of petitioners must fail. Within the geographical areas of Justice Court jurisdiction, all persons are treated the same. There is no "inherent unfairness" involved, nor anything of a "hostile or invidious" nature, such as to offend the spirit of equal protection.

After the Whittaker case, the United States Supreme Court decided Shapiro vs. Thompson 394 US 618. Petitioners claim that the Shapiro case is controlling here.

The Shapiro case did not create a new principle of law under the equal protection clause; it reconfirmed existing constitutional law (see concurring opinion of Justice Stewart at page 644). Hence it contains

nothing of which our Supreme Court was not aware at the time of the Whittaker decision.

The majority holding of the Shapiro case is to the effect that where a classification has as its object the restriction of a "fundamental right", it can only be justified against an equal protection attack by the showing of a "compelling state interest" in its existence. The more traditional test of a "rational basis" for the classification was held not to govern where a fundamental right is involved. And where the right affected is a constitutional right, that is sufficiently fundamental to require the showing of a compelling state interest.

As heretofore stated, no constitutional or fundamental right of the petitioners is invaded by the mere absence of a law degree on the part of a Justice Court Judge. That being so, we do not reach the question of whether or not there is a compelling state interest which motivated the classification. The equal protection arguments thus cannot support the relief requested by the petition.

VI. CONCLUSION

The petition states no cause of action. The demurrer will be sustained without leave to amend. The temporary restraining order heretofore issued is dissolved and the alternative writ is discharged.

DATED: AUG 5—1971

GEORGE E. PARAS
Judge of the Superior Court

APPENDIX E

ORDER DUE
October 11, 1974:

ORDER DENYING REHEARING

SAC. No. 7995

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

GORDON ET AL., *Plaintiffs and Appellants,*

v.

THE JUSTICE COURT FOR THE YUBA CITY JUDICIAL DISTRICT OF SUTTER COUNTY ET AL., *Defendants and Respondents;* THE PEOPLE, Real Party in Interest.

Draper, J., Molinari, J., and Caldecott, J., sitting in place of Wright, C. J., Mosk, J., and Sullivan, J., who deemed themselves disqualified.

Opinion modified.

Petition of the Real Party in Interest for rehearing DENIED. Application for stay of the issuance of the remittitur DENIED. THIS ORDER IS FINAL FORTHWITH.

SUPREME COURT
FILED
Sep. 26, 1974
G. E. BISHEL, Clerk
R. C. MATTEOLI, Deputy

BURKE
Acting Chief Justice

APPENDIX F

AMENDMENT XIV

Citizenship, Representation, and Payment of Public Debt

Citizenship

SECTION 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

ARTICLE VI.

JUDICIAL

[Judicial Power Vested in Courts]

SEC. 1. The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. All except justice courts are courts of record. [*New section adopted November 8, 1966.*]

[Municipal and Justice Courts]

SEC. 5. Each county shall be divided into municipal court and justice court districts as provided by statute, but a city may not be divided into more than one district. Each municipal and justice court shall have one or more judges.

There shall be a municipal court in each district of more than 40,000 residents and a justice court in each district of 40,000 residents or less. The number of residents shall be ascertained as provided by statute.

The Legislature shall provide for the organization and prescribe the jurisdiction of municipal and justice courts. It shall prescribe for each municipal court and provide for each justice court the number, qualifications, and compensation of judges, officers, and employees. [*New section adopted November 8, 1966.*]

[Judges—Elections, Terms—Vacancies]

SEC. 16.

(b) Judges of other courts shall be elected in their counties or districts at general elections. The Legislature may provide that an unopposed incumbent's name not appear on the ballot.

CALIFORNIA PENAL CODE

§ 71145. Term of, and vacancy in, office

The term of office of judges of municipal and justice courts is six years from and including the first Monday of January after the January 1st next succeeding their election. Judges shall hold office until their successors are elected and qualify, but the office shall be deemed to be vacant upon the expiration of the fixed term for the purpose of selecting a successor.

CALIFORNIA GOVERNMENT CODE

§ 71601. Qualifications of judge

No person is eligible to the office of judge of a justice court unless he either has been admitted to practice before the State Supreme Court or has within four years preceding his election or appointment passed a qualifying examination under regulations prescribed by the Judicial Council. So long as a person who qualifies for the office of judge by passing such examination remains an incumbent of such office, he shall be eligible to election or re-election to such office. This section does not apply to the incumbent of a superseded inferior court who succeeds to the office of judge of a justice court or is elected to such office at the first election of judges pursuant to the Municipal and Justice Court Act of 1949 or the provisions of law succeeding that act, or who seeks re-election to such office.

Added Stats 1953 ch 206 § 1; Amended Stats 1959 ch 735 § 1.
Prior Law: Based on:
(a) Stats 1949 ch 1510 § 13 2d sent p 2686, as amended by Stats 1951 ch 1296 § 7 p 3185.
(b) Former CCP § 98, as added by Stats 1951 ch 655 § 13 p 1845.

§ 1425. Justice courts; jurisdiction

Justice courts shall have jurisdiction in all criminal cases amounting to misdemeanor only, punishable by fine not exceeding one thousand dollars ($1,000), or imprisonment not exceeding one year, or by both such fine and imprisonment, where the offense charged was committed within the county in which the court is established except those of which other courts are given exclusive jurisdiction and except cases arising under Section 272 of the Penal Code. Each justice court shall have exclusive jurisdiction in all cases involving the violation of ordinances of cities or towns situated within the district in which such court is established.

(Added by Stats.1905, c. 543, p. 705, § 1. Amended by Stats.1929, c. 497, p. 861, § 1; Stats.1933, c. 555, p. 1454, § 1; Stats.1947, c. 756, p. 1811, § 1; Stats.1949, c. 766, p. 1495, § 1; Stats.1949, c. 1518, p. 2701, § 1, ratified at general election, November 7, 1950; Stats. 1955, c. 1173, p. 2185, § 1; Stats.1957, c. 1193, p. 2483, § 1; Stats.1961, c. 58, p. 1016, § 71; Stats.1963, c. 1959, p. 4031, § 1.)

APPENDIX G

Assembly Bill No. 2260

CHAPTER 1493

An act to add Article 3 (commencing with Section 71700) to Chapter 7 of Title 8 of the Government Code, relating to justice courts, and making an appropriation therefor.

[Approved by Governor September 27, 1974. Filed with Secretary of State September 27, 1974.]

I am deleting the $810,000 appropriation contained in Section 2 of Assembly Bill No. 2260.

This bill provides an interim solution to a judicially caused criminal caseload problem in certain justice courts. The California Supreme Court in *Gordon v. Justice Court* decided that nonattorney justice court judges cannot handle criminal cases involving potential jail sentences. In my opinion, this is bad law on the merits and a clear example of judicial legislation; in fact, this court solution has been rejected by the Legislature numerous times. The Attorney General has informed me that he will be asking for a review of this case by the United States Supreme Court; I trust that court will reverse this decision. As of August 1, 1974, there were only 82 attorney judges of a potential 213 justice court judge positions.

The substantive provisions of this bill will not be implemented until final review by the United States Supreme Court and are not effective after January 2, 1977. Because of this timeframe, it is doubtful that this solution will ever be utilized; therefore, I am deleting the money appropriated for that purpose. If the U.S. Supreme Court affirms the California decision, this interim structural solution is available; the Legislature can then appropriate the

money or money in the budget for assignment of judges can be used.

With this deletion, I approve Assembly Bill No. 2260.

RONALD REAGAN, Governor

LEGISLATIVE COUNSEL'S DIGEST

AB 2260, Z'berg. Civil actions.

Provides for temporary justice court judgeships to meet criminal caseload necessitated by the decision in Gordon v. Justice Court.

Appropriates the sum of $810,000, from the General Fund for purposes of act.

To become operative on January 7, 1975.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Article 3 (commencing with Section 71700) is added to Chapter 7 of Title 8 of the Government Code, to read:

Article 3. Temporary Justice Court Judgeships

SEC. 71700. (a) In addition to the regular justice court judgeship in each justice court district served by a nonattorney judge, there is hereby created a circuit justice court judgeship to become operative when the Judicial Council makes the finding of necessity provided for in subdivision (b). The circuit judgeship shall be filled by a person who meets the conditions specified in Section 71702, appointed by the Governor for a term which expires on January 2, 1977.

(b) The Judicial Council shall examine the workload needs of the justice courts of the state in light

of the decision of the Supreme Court of California in Gordon v. Justice Court (Sac. 7995) and in appropriate instances make the following finding of necessity: that in a particular justice court district the judicial system of the state requires an additional attorney justice court judge in order to meet the criminal caseload needs of that district and to provide necessary assistance for the criminal caseload needs of other judicial districts.

(c) Each judge appointed to a circuit judgeship created pursuant to this section shall be the presiding judge of the judicial district in which the judgeship is created.

(d) The total number of circuit judgeships created pursuant to this section shall not exceed twenty-two (22).

Sec. 71701. On and after January 7, 1975, each justice court vacancy shall be filled by an attorney judge who shall at the time of his selection be a resident of the county.

Sec. 71702. (a) Each justice court judge shall receive an annual salary of thirty thousand dollars ($30,000) if each of the following conditions are met:

(1) The judge has been a member of the State Bar for the immediately preceding five years.

(2) The judge has filed with the Judicial Council a certificate of his status as an inactive member of the State Bar.

(3) The Chairman of the Judicial Council has certified that the judge is acceptable for judicial assignments to other courts after a determination of need and available funding.

(b) The salaries provided by this section shall be paid by the counties and shall be adjusted annually

under the formula specified in Section 68203, but the counties shall be reimbursed therefor from appropriations made for that purpose by the state or from any funds made available to the Judicial Council for the assignment of judges.

Sec. 71703. The Judicial Council shall report to the Legislature and to the Governor on or before June 1, 1975, its recommendations for the organization of the justice courts of the state so that judgeships can be filled on a permanent basis at the elections held in 1976.

Sec. 71704. The Judicial Council shall adopt rules of administration to implement the provisions of this article.

SEC. 2. The sum of eight hundred ten thousand dollars ($810,000) is hereby appropriated from the General Fund to the Judicial Council for the purpose of implementing this act in accordance with the following schedule:

(a) To reimburse counties for the annual salaries of the 22 circuit justice court judgeships meeting the requirements of Section 71702 as authorized by this act, three hundred thirty thousand dollars ($330,000).

(b) To reimburse counties for the annual salaries of the 30 regular justice court judgeships meeting the requirements of Section 71702, four hundred fifty thousand dollars ($450,000).

(c) To administer this act, thirty thousand dollars ($30,000).

SEC. 3. This act shall become operative on January 7, 1975, or on the date that the decision in Gordon v. Justice Court (Sac. 7995) is final for all purposes, including any review by the United States Supreme Court, whichever is later.

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